In October of 1914, two Ojibwa men from the Nipissing Band in northern Ontario — Moses Commanda and his son Barney — appeared before High Court Justice Frank Latchford at the Sudbury Criminal Assizes. One had been charged with wounding a police officer and the other with wounding with intent. In the spring, provincial game wardens came onto their reserve, found a beaver and some beaver skins, and charged the two men with taking animals in the closed season, contrary to provincial law.

Justice Latchford was astounded to find out that, in June, the local magistrate had sentenced the two men to a year in jail for possession of the beaver skins and had also bound them over for trial on the criminal charges. On the facts adduced before him, the judge held that the shooting had been started by one of the game wardens, “and the only wounding that took place resulted from the fact that when one of the wardens had his revolver pointed at the younger Commanda, the father struck down the revolver with a birch stick, slightly injuring the game warden’s hand”.

Though the two men were acquitted by the jury, they were immediately returned to jail on the previous conviction. Justice Latchford appealed to the attorney general of Ontario to have them released and wrote to the superintendent general of Indian affairs to protest the “gross injustice” that had been done. He suggested that the department should consider entering a claim for compensation on the Commandas’ behalf against the government that had wrongfully imprisoned them.

Under the Robinson-Huron Treaty which should be as sacred as any treaty, Shabokishick and his band to which the Commandas belonged — and other Indians inhabiting French River and Lake Nipissing — were accorded the full and free privilege to hunt over the territory which they ceded, in the same manner that they had heretofore been in the habit of doing. There seems to be no possible doubt as to the meaning of the Treaty in regard to the district in which the Commandas were hunting; and yet I find that the representatives of His Majesty, in violation of the Treaty made with His Majesty’s predecessor, Queen Victoria, have interfered with the rights guaranteed by that Treaty and incarcerated the Indians for doing what they were given the right to do.[143]

The following spring, the Sudbury lawyer who had defended the Commandas free of charge chastised the department of Indian affairs for “assuming your own wards to be guilty without hearing anything from them”. J.A. Mulligan argued that the department had a duty to provide for their defence. “If you listen only to the side of the prosecution for information,” he argued, “you will not

often be called upon to spend money in the defence of your wards." The Commandas were eventually released by provincial order in council, though not before they had served well over two-thirds of their sentence.[144]

It may seem astonishing that, apart from any arguments about treaty and Aboriginal rights, an individual could be jailed for trapping a beaver out of season. But since Confederation, and particularly since the First World War, countless Aboriginal people, in all regions of the country, have been arrested and punished for violations of federal, provincial and territorial fish and wildlife legislation. They have had their guns, nets, fishing boats and motor vehicles seized. They have paid sizeable fines. And, like the Commandas, some individuals have gone to jail, often because of their inability to pay fines. This is a particularly unfortunate and relatively unknown chapter in Canadian history, and one that is far from being over.

While some of the Crown's agents may have acted out of malice, what Aboriginal people really are experiencing is the logic of state management of lands and resources, particularly as it applies to fish and wildlife. Aboriginal peoples that signed treaties in the nineteenth and twentieth centuries may have believed that their rights with respect to harvesting — their customary laws and practices — were to be protected. What they did not know, nor could they have anticipated, was that the treaty commissioners had brought with them a whole complex of societal attitudes toward fish and wildlife and how those resources were to be managed.

A number of legal and policy developments had produced the situation in which the Commandas and other Aboriginal people now found themselves. While there had been laws governing the taking of fish and game in both New France and the Anglo-American colonies, these laws were not applied to Aboriginal people, who, for reasons set out earlier, were generally treated by colonial officials as independent nations with their own usages and customs. By the mid-nineteenth century in Canada and the United States, however, two related trends were taking hold. East coast fisheries were beginning to be regulated by the colonies, and some politicians and members of colonial society had come to believe that the inland fisheries were also a matter of public right — even if that supposition was not legally correct — and that they should therefore be regulated by the state in the public interest.[145] The second phenomenon, which gathered momentum toward the end of the century, was the rise of the scientific conservation movement.

Concern for vanishing wildlife was a continent-wide phenomenon, which had

been particularly influenced by the disappearance of the buffalo.[146] In the United States, conservation developed a high profile when prominent sportsmen like Teddy Roosevelt took up the cause. Sport hunting had become a mass movement by the 1870s, and over the following decades, popular magazines like *Rod and Gun in Canada* mobilized their readers for preservation of game and fish.[147]

In the fur trade economy, Aboriginal people had harvested the furs, fish, meat, wild rice, maple sugar and other goods for trade and provisioning. Ojibwa and Algonquin people built the great bark canoes that travelled the inland waterways of central Canada; Métis boat builders constructed the flat-bottomed vessels that plied the Hudson Bay drainage and the Mackenzie River system. Aboriginal people also worked as boat men, packers and guides along the transportation network. In the new industrial and agricultural economy, settlers took over much of this work, and governments regulated access to key resources on their behalf. Aboriginal people therefore experienced progressive encroachment and restriction, both as direct competition for fish and fur and through legislated restrictions on their harvest.

Fishing

One of the very first targets in the nineteenth century was commercial fishing. There is no question that fisheries required regulation on the Great Lakes and in northwestern Ontario, where the situation was becoming a free-for-all, particularly as Americans entered Canadian waters.[148] But the effect of regulation was to eliminate or severely reduce existing Aboriginal commercial fisheries.

The first fisheries legislation in the Province of Canada (1857-58) gave the commissioner of Crown lands the power to lease fishing stations on all “vacant public lands still belonging to the Crown”.[149] Because of the potential conflict with treaty fishing rights, the superintendent general of Indian affairs reached an agreement with the commissioner of Crown lands that would recognize an Aboriginal right of first refusal on fishing leases located in front of “inhabited Indian lands”. In one sense, this agreement can be considered an early precursor to the kind of priority allocation for Aboriginal people enjoined by the 1990 *Sparrow* decision of the Supreme Court of Canada.[150]

As implemented by government officials, however, the policy had the opposite effect, because most existing Aboriginal fishing grounds were thereby opened

to commercial lease. Of the 97 leases issued on Lake Huron during the first regulatory season in 1859, 71 went to non-Aboriginal 'practical fishermen', 14 to the Hudson's Bay Company and only 12 to 'Indian Bands'. Over the following four years, the number of Aboriginal leases dwindled to almost none.[151]

In the case of the sturgeon fishery, government regulations not only favoured non-Aboriginal commercial operations, they effectively destroyed the fishery itself. Until the turn of the century, sturgeon was an enormously abundant resource and the basis of many Ojibwa and Cree economies. For generations, sturgeon had been taken for both subsistence and commerce, but not overfished. In the great inland sturgeon lakes — Lake Nipissing, Lake Huron, Lake of the Woods, Lake Winnipeg — the settler commercial sturgeon fishery, newly established in the 1870s and 1880s to supply distant markets, proved completely unsustainable, and catch levels plummeted to a small fraction of peak levels within a decade or two. Repeated pleas to federal authorities by First Nations to save the fishery and their livelihoods failed to reduce the magnitude of mismanagement.[152]

A similar situation prevailed on the west coast, where the federal government took over regulation of the fishery after 1871 and explicitly regulated the Aboriginal fishery from 1888.[153] There, the "white preference" in the licensing system was an explicit, rather than implicit, goal of government regulation.[154] Nevertheless, Aboriginal people did play an important role in the British Columbia canning industry.

Subsistence hunting and fishing

But it wasn't just the Aboriginal commercial fishery that was affected by government regulations and policies. Many techniques of the Aboriginal food fishery — including the use of spears and gill-nets, as well as night fishing by torchlight — were offensive to sports anglers, as were certain hunting activities. During the legislative debate on the 1857 *Fishing Act* of the Province of Canada, M.L.A. John Prince attacked the use of spears and other Aboriginal techniques:

There was no skill requisite to use the spear; it was a dastardly and mean thing to hold a torch at the surface of the water, waiting until the fish came up, and then to stick it with a fork. It was as bad to do this as to follow the practice of some individuals who go out into the woods with hounds, and hunt the poor deer into the lake, and then take a canoe, paddle over to the poor animal, and

shoot it. No sportsman would follow such discreditable sport. He himself would rather take deer on the bound, or cast a fly at the fish he wished to capture.[155]

Such techniques were not offensive to rural settlers, who learned how to spear and net from their Aboriginal neighbours.[156] In fact, spearing can be much more efficient than angling as a means of selecting fish by size and age class.[157] What John Prince's comments indicate is a continuing conflict between the goals of those who take fish and game for food and those who do so for sport. Prince was an affluent English emigrant steeped in the literary lore of the rod and the chase. As the first judge in northern Ontario (in the 1860s), he tried to persuade the Indian department to ban Aboriginal hunting and fishing altogether on the grounds that such activities were better left to sportsmen like himself.[158] This tension between sport and support characterized much of the game and fish legislation in the first century after Confederation. Laws passed in Ontario (1892-1893), Quebec (1894), British Columbia (1895) and for the Northwest Territories (1897), as well as their many later amendments, were uniformly based on recommendations from recreational hunters and anglers and strongly influenced by the scientific conservation movement. They closed seasons for many species, limited take, and banned certain techniques of harvesting — including the use of spears and gill-nets and hunting with dogs.

All of these laws placed a ban on so-called market hunting — that is, the sale of wild meat.[159] The latter was a traditional activity not just of Aboriginal people but of settlers in remote regions. Supplying wild game to urban or rural markets, or to logging, mining and survey camps became a penal offence. Since fresh domestic meat was scarce or nonexistent in frontier areas, the latter prohibition was often honoured in the breach (and not just by Aboriginal people).[160] Later legislation limiting the Aboriginal harvest included acts that prohibited the spring hunt for waterfowl in the far north and gave the prairie provinces certain regulatory powers over Indian hunting and fishing.[161]

**Aboriginal Participation in the British Columbia Salmon Fishery**

The early history of the British Columbia salmon fishery was characterized primarily by rapid and significant expansion of fishing and cannery operations into the interior and northern British Columbia. From 1871 to 1966, when the last cannery was built, more than 220 individual cannery sites were established, with over half of them by 1905. It was not until the 1960s that the federal government first began to introduce licence limitations in the commercial salmon fishery, at about the same time that the provincial government began to promote fish farming and the sport fishery.

Many of the prime fishing and cannery sites were on the traditional and reserve lands of Aboriginal peoples, since their primary source of food and livelihood centred on the sea and its resources. As salmon is a perishable good, the canneries had to be built close to fishing grounds. As a consequence, the fishery's development is marked by exploitation of Indian land, resources and labour. In 1902, writes historian Dianne Newell, Henry Doyle, the general manager of the newly formed British Columbia Packers Association "casually staked claims for cannery locations even where he suspected that they were located on Indian reserves. In at least one case, he negotiated with the Indians concerned for a lease on their land and a guarantee of employment for local Indian fishers and shoreworkers should a cannery ever be built there".

Until the First World War, Indians dominated the labour market, given the industry's reliance on transient labour that could quickly respond to a 'run' lasting two to three weeks. But then the situation began to change. With the onset of the war, the demand for canned food escalated sharply, prompting heavy overfishing and the licensing of new cannery operations. In 1919, the federal government lifted a pre-war policy of limited entry in fishing and canning in order to accommodate the needs of returning war veterans. Fishing licences specifically excluded Japanese fishers; and while licensing included Aboriginal people, in practice, according to Dianne Newell, it had the opposite effect:

Indians were not treated on equal terms with whites. Indian fishing licences were concentrated in the north. As numbers of licences issued to Japanese declined, only the number of licences issued to whites increased, while those to Indians remained roughly the same. In order to keep up the number of Indian cannery workers it became customary in

the major district for cannery operators to use only those Indian fishers who had female relatives who could work at the cannery. Even then the Indian fishers reported they often received insufficient and sub-standard gear.

This licensing policy has had a lasting impact on the relative distribution of Aboriginal people within the commercial fishing industry. Not only did the absolute number of Aboriginal licence holders continue to drop, but the proportion of Aboriginal people involved in canning continued to outnumber those engaged as employees in the fishery itself. At present, for example, the United Fishermen and Allied Workers' Union estimates that about 40 per cent of the shoreworkers in its membership are Aboriginal, while about 10 per cent of those working in fishing vessels are union members.

Source: Based on Dianne Newell, ed., The Development of the Pacific Salmon-Canning Industry: A Grown Man's Game (Montreal and Kingston: McGill-Queen's University Press, 1989); and Canadian Labour Congress, "Aboriginal Rights and the Labour Movement", brief submitted to RCAP (1993).

The Commission would not want to suggest that there were no valid conservation objectives behind such legislation. The assault on North American wildlife in the late nineteenth century is a fact.[162] But even at the time, there were differing views about the primary causes of species depletion. Some individuals, including Nova Scotia-born William Whitcher, federal deputy minister of fisheries in the 1870s, assigned Aboriginal people a considerable portion of the blame. A hero of the early Canadian conservation movement, Whitcher was an avid fly fisherman and had worked as a fisheries overseer on the Restigouche River and then on Lake Huron in the 1850s and '60s.[163] Replying in 1878 to a letter from his counterpart at Indian affairs, who had complained that the fisheries department's new regulations were interfering with the rights and livelihoods of Indian people in the maritime provinces, Ontario and the lower St. Lawrence River region of Quebec, Whitcher asserted the necessity of federal control as well as the paramountcy of statute law over any treaty rights:

The protection of certain kinds of fish during their breeding time has proved a great public benefit to the whole country, as well as to the Indians themselves, the fish having again become plenty in districts where they had formerly been netted and speared unrestrictedly and were nearly exterminated. The rapid disappearance of game which is stated in the same letter to be a cause of

destitution amongst the Indians is due almost entirely to unrestricted hunting, pursued also by Indians; and a similar condition of things would inevitably result to the inland fisheries were the habit of indiscriminate fishing to be restored, thus imposing still further deprivation on whites and Indians alike.

On referring to the treaties mentioned, it does not appear that any unrestricted fishing or hunting was guaranteed; but, on the contrary, the Statutes then in existence specified restrictions applicable to the whole community, but which were until lately inefficiently enforced ... .It is well known that much of the laxity which prevailed in former times, and the prevalence of destructive practices of fishing, particularly by Indians, were due to false sympathy with the pretended sufferings which it was alleged they must sustain if prevented from indulging their habitual preference for spearing fish on their spawning beds ... .

The question would undoubtedly be asked — What claims are possible and sufficient in favor of Indians to injure and destroy a valuable public property that are paramount to the rights and interests of a great majority of the inhabitants to preserve and increase it for the benefit of the trade and industry of the whole country? Besides, it is well known that, as a matter of fact, the Indians are themselves benefitted through the operation of the present system.[164]

By contrast, at least some Indian department officials felt that treaty rights were entitled to respect. The Indian agent for Georgian Bay, Ontario, Charles Skene, agreed with William Whitcher that some sort of restriction on the times and seasons for fishing and hunting was necessary. But as he told his departmental superiors, environmental damage, along with pressure from the general society (and American fishermen), were largely responsible for the precipitous decline in fish and game populations:

I am at the same time of opinion that the scarcity of game and fish has been caused more by the pollution of the rivers & spawning Beds by throwing in Saw Dust and other Mill refuse and by the great quantities of fish and Game of all kinds killed by the white men for the purpose of sale than by the Indians spearing on the Shoals and Banks. As far as my experience goes all that the Indians killed by spearing or with the small nets or other limited means was not of much consequence — and certainly so long as only the Indians fished & hunted no one heard of the great scarcity of Game & fish that now prevails ... .

With regard to the Salmon and Trout I entirely agree with Mr. Whitcher that interfering with the Spawning beds should be entirely put a stop to but I think that the greater evil of casting in Saw dust should also be entirely put an end to.

And the rivers being entirely within the Dominion this could be done effectually. As to the Spawning Beds in the Large Lakes — where the Lake Salmon and the White Fish spawn — of course it is in the power of the Government to stop spearing etc on them within the Line between the Dominion and the United States — but I much question the United States aiding the Dominion by a like prohibition on their side — yet I think something should be done in the way of Restriction.

But any such law will come hard upon the Indians who depend so much upon the fishing — the fish they kill in the Fall forming a principal part of their support during the winter and for this they depend so much upon spearing — as they are unable to procure the large number of nets required and with their small boats and canoes they would be unable to set them if they had them. And as for their small nets the fishing along the Shore where they used to set them has been so destroyed by the Saw Dust and mill refuse that they are of little or no use ... .

Mr. Whitcher says ‘On referring to the treaties mentioned it does not appear that unrestricted fishing or hunting was guaranteed’. Now I differ from him there as I think that the Robinson Treaty does guarantee this in as much as when that Treaty was made and the Indians ceded their Territory no restriction was known by the Indians but they hunted and fished as best suited them and a clause in the Robinson Treaty says ‘And further to allow the said chiefs and their tribes the full and free privilege to hunt over the Territory now ceded by them and to fish in the waters thereof as they have heretofore been in the habit of doing, saving and excepting such portions of the said Territory as may from time to time be sold or leased to individuals or companies of individuals and occupied by them with the consent of the Provincial Government’.

I consider this clause very distinct and explicit and that unless it can be proved that the Indians did not at that time spear fish the right to do so cannot be taken from them without breaking faith with them.[165]

The preceding correspondence has a very modern ring to it. Different views about what, if anything, constitutes a justifiable infringement of Aboriginal rights are still at the heart of the conflict between government regulators and Aboriginal people. For more than a century, this conflict has pitted the rights of all members of society to harvest fish and wildlife for sport or commerce (under state regulation) against the rights of Aboriginal people (often enshrined in treaty) to take fish and wildlife for their own purposes — even according to their own rules.[166]

The agent's observations about pollution from the sawmills of Lake Huron and Georgian Bay were repeated by agents in northwestern Ontario and British Columbia, who were receiving complaints from First Nations about the impact of sawdust on the rivers and streams of their traditional territories.[167] It is also interesting to note that, despite agent Skene's concern for his charges, neither department believed that Aboriginal people themselves should have any role in the management or regulation of game and fish.

For a time, provincial and territorial laws did recognize the subsistence needs of settlers and Indian peoples in certain remote regions. For example, section 12 of Ontario's game protection act of 1892 provided that game laws would "not apply to Indians or to settlers in the unorganized districts of this Province with regard to any game killed for their own immediate use for food only and for the reasonable necessities of the person killing the same, and his family, and not for the purposes of sale and traffic".[168] Similar clauses appeared in British Columbia and Northwest Territories legislation.[169] The frontier ideal of a free man with deer or moose in his larder still has currency in many parts of Canada. Settlers — farmers, woodsworkers, and prospectors — hunted and fished for their own subsistence. Many immigrants from Great Britain, where in the eighteenth and nineteenth centuries rural folk who hunted for sustenance on private land — that is, most of the country — could be jailed, exiled or sentenced to hang, valued highly their new freedom in North America.[170]

The provision of a subsistence harvest for non-Aboriginal people was particularly useful for Métis people, since provincial, federal and territorial regulators did not think that Métis people had any special rights to take game and fish. But by the 1920s, such clauses had also been dropped from legislation. The laws, then, were as much about allocation as they were about conservation — about who was entitled to take what, and for what purpose. By the 1930s, recreational hunting and angling had triumphed. As David Taylor, Ontario deputy minister of game and fisheries, explained to the department of Indian affairs in 1936, the fish and game resources of the province were far too important to be left to Aboriginal people or settlers:

I think you will appreciate where we have a natural resource by way of game and fish that is instrumental in attracting to this Province annually Tourist trade valued at from $50,000,000 to $80,000,000, that the Province would be much better off annually to keep these Indians in more or less luxurious fashion than to allow them to slaughter, particularly for dog feed, the game and fish of this Province ...

I presume your Department will be only too anxious to cooperate with us in this respect to the extent of having your local Indian Agents cease informing the Indians that they have privileges beyond what the laws of the Province permit, as this has from time to time a tendency to give us considerable trouble.[171]

The privileges to which the deputy minister referred were those set out in agreements such as the Robinson treaties of 1850, Treaty 3 (1873) and Treaty 9 (1905-1906; 1929-1930), entitling Indian people to hunt, fish and trap on unoccupied Crown land. In the prairie west and north, wildlife officials took the same position on the treaties that applied to their areas. In the 1930s and '40s, employees of the Northwest Territories commission — one arm of the federal department of mines — explicitly rejected statements from the Indian affairs branch — another arm of the department — that treaty Indians had any specific harvesting rights on public lands.[172] In 1954, the superintendent of welfare for the Indian affairs branch advised one of his officers, with respect to an individual who had been charged with a hunting offence, that "it is not the desire of the [Indian Affairs branch] to inform Indians fully concerning their Treaty rights because conservation and management could be defeated by so doing".[173] Ontario was still prosecuting treaty Indians for hunting on unoccupied Crown lands as late as the 1970s.

In the maritime provinces, neither the federal nor the provincial governments conceded that there were treaty harvesting rights at all. In 1925, Indian affairs official J.D. McLean told Moncton, New Brunswick, lawyer George Mitton, who had been retained by Chief Dan Paul of the Eel Ground Reserve near Newcastle, that Canada did not recognize a 1752 treaty that the chief was insisting had acknowledged Aboriginal rights to hunt and fish. "This department," McLean added, "has recognized the exclusive right of the provinces to legislate with respect to hunting and fishing and has advised the Indians that they must obey the laws of the provinces with respect thereto."[174] On the rare occasions when Aboriginal people used a treaty defence in court, they usually lost — as in the 1928 *Syliboy* case, when a member of the Mi'kmaq people from Cape Breton Island was convicted of illegal hunting. The Nova Scotia County Court dismissed the effect of the 1752 treaty with the Mi'kmaq on a number of grounds, among them that the treaty applied only to a small band living near the Shubenacadie River in Nova Scotia.[175]

In the 1985 *Simon* case, the Supreme Court of Canada upheld the validity of the 1752 treaty, but this was half a century too late for Syliboy and the many other Indian people from the Maritimes who paid the price for violating

provincial game and fish laws.[176] The wife of Peter William Narvie of the Eel River Reserve in New Brunswick wrote the Indian department in April 1929 that "my husband is in jail for having venison in his possession". He had believed, she said, in the treaties which said that "the Indians could fish and hunt any time of the year for their own use":

Dear Sir my husband and three other Indians went by those Treatys and went in the forest to get enough meat for a few meals because we were almost starving and couldn't get help from our Agent neither could the men get work of any kind around here to make a living and we were very hungry. And he was arrested for that and put in jail to serve fifteen days sentence or thirty one dollars fine. Now while he is in jail my two babies and I are going from one house to another begging our meals. While my husband was out on bail in between the trials he found a job for all summer and just because of this case, he is going to lose his job, and God knows when he will be able to find another because the jobs are not plentiful for the Indians especially.[177]

Most Aboriginal defendants could not afford lawyers. In this particular instance, however, Narvie and the other defendants had hired a lawyer from Dalhousie, New Brunswick to defend them, believing that they could pay him out of band funds. But the department refused to honour the account because, by virtue of amendments to the 1927 *Indian Act*, the lawyer's services had not been engaged by proper authority. Moreover, as officials in Ottawa explained to the angry barrister, "it is not the policy of the Department to provide a defense for Indians in cases of this kind".[178]

A century of effective prohibition of activities that treaty beneficiaries believed had been guaranteed to them by treaty has had a major impact on government and on society generally. Part of the corporate memory of provincial resource management agencies is that Aboriginal and treaty rights do not exist. It is no accident that groups such as the Ontario Federation of Anglers and Hunters continue to maintain that "Treaty Indians do not possess any *exclusive* claims to Crown land or resources within the geographic boundaries of Ontario, with the exception of their reserves".[179]

## Tourism

In some parts of Canada, Aboriginal people worked in the early tourism industry, which began to flourish in the late nineteenth century as steamboats and railways opened previously inaccessible regions to recreational travel.

Aboriginal people served as guides, packers and cooks for parties of hunters or fishermen in frontier regions. In the lake districts of southern Ontario and Quebec, they were employed by the growing numbers of tourist lodges and youth camps. But as the example of commercial guiding in the Yukon shows (see box), with increasing competition from non-Aboriginal people and increasing government regulation, Aboriginal people found themselves gradually excluded from this industry as well.

In some cases, the effect of government regulation on Aboriginal livelihoods was unintentional but just as severe. Legislation passed in New Brunswick in 1897 and 1898, for example, required persons not "resident and domiciled" in that province to obtain a licence if they wished to act as a guide or camp help. Such activities had been a significant source of income for Mi'kmaq people living on the Restigouche Reserve just across the provincial boundary in Quebec, the Restigouche being a popular destination for tourists from the eastern seaboard of the United States. But although they protested to the department of Indian affairs that they could not afford the non-resident licence fee of $20 (10 times the resident rate, and equivalent to more than a month's wages), New Brunswick would not make any exception for those they referred to as "Quebec Indians".[180]

### *Trapping*

One industry in which Aboriginal people were the exclusive primary producers during much of the nineteenth century was the fur trade. As with hunting and fishing, however, the imperatives of provincial and territorial regulation ran head-on into the assumption by Aboriginal people that the treaties protected their rights to trap.[181] Earlier in the chapter we described the case of the Commandas, jailed in Ontario in 1914 for trapping a beaver contrary to provincial regulations. The same collision occurred in all regions of the country. In March 1915, a Mohawk trapper from Kanesatake, Andrew La Fleche, was arrested by two Quebec game constables for attempting to sell 101 muskrat skins to a trader in Montreal. In his defence, Mr. La Fleche cited the *Royal Proclamation of 1763* and a proclamation of Quebec Governor James Murray in 1762 as support for his contention that he had a treaty right to hunt and trade fur. His furs were confiscated, he was fined and the department of Indian affairs, to which he had appealed for assistance, advised him that the proclamations to which he referred were "repealed many years ago and the Game Act is now in force".[182]

It is not difficult to see why Quebec officials, like those in other jurisdictions,

thought Aboriginal people should be treated no different than the non-Aboriginal population when it came to hunting and fishing regulations. The provinces were not accountable for Indian people and Inuit, who were considered wards of the federal government. Armand Tessier, the Indian agent at Pointe Bleue, who tried for many years to have Aboriginal rights recognized, explained his problem in a 1913 article in the newspaper *L'Action sociale*:

I understand that the provincial government is not responsible for these people, who are under the guardianship of the federal government, and that, if injustices are done to their detriment by the imposition of laws, it is due simply to the fact that not having direct relationship with them, the government forgets them or does not think about them. [translation][183]

In asserting their trapping rights, however, Aboriginal peoples had one powerful and influential ally: the Hudson's Bay Company. Before the First World War and between the two world wars, the company took legal action against provincial game officials who confiscated furs from Aboriginal people, arguing that such behaviour violated treaty rights. If Aboriginal people had a right to trap, they said, then necessarily they had a right to sell. The precipitating factor had been the arrest and conviction in 1910 of one of the company's northern Ontario managers for illegal possession of furs. George Train had been given a penalty of $6,150 or, in default of payment, imprisonment for 20 years, six months.[184] Company lawyer Leighton McCarthy had intended to appeal the conviction to the privy council, if necessary. Although both sides agreed to put the points of law — including the treaty rights of the people from whom George Train had purchased the pelts — directly to the Ontario Court of Appeal, Ontario managed to delay the appeal hearing until 1913.[185] A year later, Chief Justice William Meredith informed the parties that he considered it best not to render a decision and urged Ontario and the company to negotiate. The only official rationale the chief justice gave was that a judgement might affect the "real interests of the Indians"; the company's lawyer claimed to the department of Indian affairs that the real reason for the non-judgement was that the court did not want to find that treaty harvesting rights prevailed over Ontario's game laws.[186]

**Aboriginal Guiding in the Yukon**

Until 1920, guides for big game hunting in the Yukon did not require a licence, and the industry as a whole was unregulated by the territorial council. Aboriginal and non-Aboriginal guides maintained an equal footing within the community and in commerce. Many Aboriginal people in the Yukon worked as guides because they had intimate knowledge of the terrain and habitat, and because guiding complemented their overall lifestyle. Indeed, the success of the industry depended largely on Aboriginal people for the same reasons.

However, as overkill provoked concern from the fledgling conservationist movement, and as revenue generated from the industry grew, big game hunting came under increasing territorial regulation, to the distinct disadvantage of Yukon Aboriginal people. First, overkill was blamed largely on Indian guides, rather than on overall hunting pressure and habitat disturbance. “Of late years”, stated the 1916 official Yukon Guidebook, “game of all kinds has been very scarce in some localities....The Indians, having lately acquired high-powered magazine guns are responsible

for a great deal of the slaughter as the average Indian who gets into a band of big game shoots as long as his cartridges hold out, whether he can use the meat or not.”

Big game hunters became a major source of income for individuals and businesses involved in the industry and for the territorial council, which received fees for permits and licences. In 1923, the territorial council amended the game ordinance specifically to bar Indian people from becoming chief guides, although they were not prevented from applying to be guides, assistant guides and helpers. In other words, Indian people could be employees but not employers soliciting their own business. The attitude of the Whitehorse government agent responsible for issuing licences is instructive: “It really means the taking away of the livelihood of guiding from the white man if any more Indians are granted the privilege of acting as Chief Guides”.

As a direct result, many guides gave up their Indian status and attendant rights in order to start or maintain a business. However, many who chose to become enfranchised were still blocked in their attempts to obtain a

chief guide's licence through bureaucratic delays or unreasonable terms. For example, after waiting a year, George Johnson, a Teslin Lake Indian, was turned down in 1934 for a chief's licence because he had no horses, even though, as he reasoned, there was no point in purchasing horses on speculation.

Source: Robert McCandless, Yukon Wildlife: A Social History (Edmonton: University of Alberta Press, 1985), pp. 53, 58, 60.

The same issue came before the court of appeal almost two decades later in the case of *R*. v. *Padgena and Quesawa*. The defendants, who were Robinson treaty beneficiaries from Pic River on Lake Superior, had been convicted by a magistrate in 1929 of illegal possession of beaver pelts and fined $600. The Indian affairs branch (by now part of the department of mines) had instructed the Indian agent for Port Arthur to attend the trial and ask for leniency but specifically directed him not to raise any question of treaty rights. (He managed to get the fine reduced to $200.) With the support of the local Hudson's Bay Company manager, however, the two defendants hired a lawyer and appealed.[187] In April 1930, district court judge J.J. McKay overturned the convictions, finding that provincial regulations should not annul the defendants' rights under treaty.[188] Ontario appealed, and the Indian affairs branch found that it now had no choice but to act for the two individuals. In a letter to the Ontario minister of mines, the minister responsible for Indian affairs explained that the federal government did so reluctantly, "not in any hostile spirit but simply as a natural obligation that devolves upon the department in its capacity as guardian of the Indian interest":

The Indians in question have no funds to defend this appeal and have asked the department to employ counsel for them. In the circumstances I think you will agree that it is scarcely possible for the department to refuse to comply with their request ... .In view of the constitutional question involved, it would seem desirable that the case should be fully expounded pro and con by eminent counsel inasmuch as the subject has become a source of perennial dispute between the Indians and Game Wardens, and a source of embarrassment to both our departments.[189]

Indian affairs retained a Toronto law firm to act in the appeal, which was set to take place in December 1930. As with the earlier *Train* case, however, Ontario was granted a delay of proceedings until October 1931. In the meantime, the province continued to prosecute trappers in the region, despite Justice McKay's

decision.[190] Ontario, in fact, wanted a negotiated settlement that would preserve their right of regulation, as, apparently, did the court of appeal. Lawyer M.H. Ludwig advised Indian affairs that Chief Justice Mulock “does not want to hear the case for the reason that his view is in favour of upholding the treaty obligation”.[191] In late 1931, Canada and Ontario agreed to halt the legal proceedings on a promise from the province to negotiate an accommodation. But those negotiations never took place, and Ontario continued to enforce its regulations. As for Joe Padgena and Paul Quesawa, the Indian defendants from Pic River, they never got back the $200 they paid in fines, despite the fact that their convictions had been overturned.[192]

With the building of railways in eastern and western Canada, Aboriginal people came to face another severe problem, namely, competition from non-Aboriginal trappers. Particularly in the aftermath of the First World War, when fur prices skyrocketed, droves of trappers and traders entered previously remote regions of the country in search of pelts. Many were young, single men who intended to make as much money as possible and then leave. To that end, some of them used poisoned bait, much to the revulsion of Aboriginal communities. Hudson’s Bay Company official Philip Godsell, then working in the Northwest Territories, described the stark contrast between the trapping methods of these new arrivals and those of Dene with whom he regularly traded:

The professional trapper does not make an occasional short trapping journey as does the Indian, then forget about his trapline for a while, neither does he “farm” his territory as was done by Indians until just a few years ago. Instead he brings in a complete grub-stake from the “outside” in the fall ... .From the first snowfall until the ice breaks up he is tirelessly on the go, and in the course of a single season will accumulate three or four times as much fur as an entire Indian family has been in the habit of taking out of the same territory over a period of years.[193]

The department of Indian affairs did attempt to secure the co-operation of provincial and territorial officials in protecting Aboriginal trapping. But most jurisdictions rejected the department’s preferred approach, which was either to ban non-Aboriginal trappers from the industry entirely or to set aside areas where only Aboriginal people could trap. In the Yukon, the territorial council sided with non-Aboriginal trappers, arguing that it would be impossible to exclude them. In Ontario, the province allowed non-Aboriginal trappers to follow the Temiskaming and Northern Ontario Railway north of Cochrane, despite urging from the Indian affairs branch that the Moose River basin area be zoned exclusively for Aboriginal people. In British Columbia, the province assumed

the right to allocate traplines in 1921, and many traplines were given to the new arrivals. George Pragnell, inspector of British Columbia Indian agencies, reported in 1924 that the "almost universal complaint by the Indian is that their lines are seized by white men under cover of the law". The inspector pointed out that virtually every area of the province was already allocated to traplines according to Aboriginal custom.[194]

Only in the Northwest Territories and Quebec did a different system prevail. In the N.W.T., a 1923 federal order in council set up four large zones — the Yellowknife preserve, the Thelon preserve, the Peel River preserve and the Slave River preserve — where only Aboriginal people could hunt and trap.[195] Between the 1920s and the 1940s, Quebec co-operated with the Indian affairs branch in establishing a series of beaver preserves throughout the north, where only Aboriginal people could trap, and banning non-Aboriginal people from trapping north of the Canadian National Railway line.[196] Quebec's regulations are also interesting because they did not discriminate against Métis people, simply assigning the trapping rights to all those of Aboriginal ancestry. Within the beaver preserves, Aboriginal people were paid as "tallymen", to count the number of live beaver each year.[197] This kind of work-substitution program accorded well with the traditional economy and can be considered a forerunner of the income support programs introduced by the James Bay and Northern Quebec Agreement. (See our discussion of income support programs for harvesters in Volume 4, Chapter 6.)

The climax in the trend of provincial control came in the 1940s. By then, most provinces and territories had introduced systems requiring everyone, Aboriginal people included, to apply for and register their traplines.[198] Because of the importance of existing systems of animal harvesting among the treaty nations, this system proved deeply controversial and was one of the precipitating factors in the rise of organizations such as the North American Indian Brotherhood, headed by Chief Andrew Paull of British Columbia and Henry Jackson of Ontario, and the North American Indian Nation, headed by Jules Sioui of Village Huron. These men urged Aboriginal trappers not to take out licences or registrations on the grounds that they violated treaty and Aboriginal rights, statements for which they were soundly denounced by the Indian affairs branch.[199]

Particularly galling to Indian rights associations was the treatment of Aboriginal veterans of the Second World War, many of whom returned from their years overseas to find that provincial governments were already awarding their traplines to non-Aboriginal people. On the eastern side of Ontario's Algonquin

Park, for example, none of the members of the Golden Lake First Nation who applied for registration of their existing traplines were successful. “Military service is apparently not taken into consideration”, complained Hugh Conn, fur supervisor for the Indian affairs branch, in a 1947 letter to the head of Ontario’s fish and wildlife branch, “as we find approved applications of men without military service in preference to Indians with four years’ overseas service”. Conn pointed out that the Golden Lake people had already lost most of their traditional trapping territories in the 1890s “without compensation” when Algonquin Park was created and hunting and trapping banned within its boundaries.[200]

Despite these protests, Aboriginal people lost out to non-Aboriginal trappers in all but the most remote areas. In part the motive was financial. In British Columbia, for example, the province earned fees from the trapline registrations of non-Aboriginal people, but not from Indians. Aboriginal people were also accused of not being efficient enough in trapping fur. Thus, replying to Hugh Conn’s 1947 inquiry about why so many existing traplines in Ontario were being given to non-Aboriginal people, the head of the fish and wildlife branch, W.J.K. Harkness, replied that it was “because the standard of trapping practice on which the priorities were decided favoured the white trapper over the Indian trapper, and not because the Indian trapper was discriminated against because he was an Indian”.[201]

The consequences for the Aboriginal economy of the loss of traplines were devastating in many regions of the mid-north. By 1956, according to the game commissioner for British Columbia, only 10 per cent of the province’s traplines were being operated by Aboriginal people.[202]

There is a direct link, therefore, between government regulations and policies that favoured non-Aboriginal trappers, commercial fishers, and recreational hunters and anglers and the decline in Aboriginal self-sufficiency. In the spring of 1939, Kenora Indian agent Frank Edwards reported to his superiors in Ottawa that he had asked Ontario game and fisheries deputy minister David Taylor the previous summer “how the Indians were going to make a living”. According to Edwards, Taylor had replied that “it was nothing to do with him ... .It was our department’s baby, not his, and the Indians were not going to live on the province’s moose, deer, fish, etc. and some other way of their making a living should be devised by us”.[203] The problem for the department was that there were few other sources of livelihood. In many cases, the only real alternative was government assistance.

### *Disrupting the harvest: 1950-1970*

As we have just seen, for more than a century, progressive encroachment and restriction of their land-based activities have been the common experience of Aboriginal people living in the rural and near-northern areas of Canada. There has been substantial variation in the intensity of the disruption, even north of settled agricultural lands. Up to about 1950, the effects of settlement and resource development were probably greatest in the railway belts of northern Ontario and Manitoba, perhaps least in northern Quebec and the Labrador interior. They were hardly experienced at all in the Arctic before that time.

The Second World War and the development boom that followed it in the 1950s and '60s transformed the north. First there was the rapid construction of military bases, airfields and radar stations; then there was a significant northward advance of all major resource activities. These included chiefly hydroelectric development (often involving large-scale impoundment, diversion, and regulation of waterways); mining and forestry in the boreal region; and oil and gas exploration and mining in the Arctic. In the mid-north, these were often accompanied by an infrastructure of roads, railways and new towns, many of which constituted major projects themselves. These developments were accompanied by newly expanded and activist government administrations. They also enabled much readier access to the north by a newly prosperous and mobile southern population.[204]

These developments intensified — and geographically extended — familiar forms of encroachment and restriction, such as regulation and enforcement of subsistence harvesting and competition from non-Aboriginal people for subsistence resources. They also introduced new and previously unimagined threats to the viability and autonomy of Aboriginal ways of life. These included the seizure of lands for industry, transport and settlement; disruption of waterways for hydroelectric development and water storage; alteration, destruction or pollution of habitat, whether by design or accident; a growing network of roads and trails giving transients and tourists easy access to traditional harvesting areas; increased stress on animals because of noise, harassment, obstructions or other consequences of human activity that result in death, ill health or dispersal; and contamination of fish and other wildlife (by heavy metals such as mercury or by organochlorines or radionuclides, for example) making the wildlife unfit for human consumption. These changes, caused relatively recently by development, concerned many of the Aboriginal witnesses at our hearings, as we saw earlier in this chapter. The adverse effects of forestry and hydroelectric development, for example, are keenly

experienced by Aboriginal people in small communities especially.

Highly mechanized logging (mostly for pulp) is a relatively new phenomenon, one that has been on the upswing since the early 1960s. Because it involves clear cutting of very large areas, important wildlife habitat (and thus valued hunting and trapping land) is suddenly and completely denuded. Other adverse effects of clear cutting include stream degradation, road construction and, in rugged terrain, slope destabilization and erosion. Contamination also occurs, primarily in association with pulp mills. The northward extension of mechanized pulp cutting into slower-growth forests, particularly in Quebec, Ontario, Manitoba and Alberta, has exacerbated this trend.

For Aboriginal people, one of the most significant adverse consequences of the pulp and paper industry's practice has been the building of an extensive network of forest access roads that sport anglers and hunters can use. As we saw earlier in this chapter, Dene Th'a and other Aboriginal people have been protesting the impact on their traditional economy of the resulting increase in competition for fish and other wildlife, particularly big game species like moose, caribou and elk. During the fall hunting season, many northern Aboriginal residents stay out of the bush altogether.

Since the turn of this century, there has also been massive hydroelectric development across the mid-north, most notably in Labrador, Quebec, Ontario, Manitoba and British Columbia.[205] As the example of Manitoba Hydro's Nelson-Churchill River project shows (see box, overleaf), such development has generally resulted in the flooding of large areas, seasonal reversal of flow, reservoir draw-down, and sometimes river diversion and dewatering. These physical effects, which occur in varying combinations upstream and downstream of major installations, are normally associated with reduced biological productivity in littoral zones, the elimination of rapids and hence spawning areas for certain fish, the disruption of productivity in large lakes, and the creation of unpredictable and often unsafe travel conditions, especially on river ice. As well, large developments have resulted in methyl mercury contamination, leading to commercial fishery closures and threats to domestic fishing, which is often the most important local food source. These effects are very long lasting, if not permanent, and can be exacerbated by changing operating regimes. Harvest disruption and community relocation are common consequences (see Volume 1, Chapter 11).

As in the period before 1950, whenever fish, fur and wildlife resources were depleted or perceived by management agencies to be in danger of depletion,

Aboriginal use was a prime target for control. Wherever they were perceived as abundant, Aboriginal people were regarded as not using them to maximum efficiency, and others were given priority access. Moreover, treaty and Aboriginal rights continued to be interpreted as providing for food and family use only. This interpretation is noteworthy in light of the structure of Aboriginal traditional economies. While distinct from market-based economies, Aboriginal economies were by no means limited to subsistence. Instead, if Aboriginal economies are understood in relation to the broader structure of Aboriginal societies, 'commerce' was and remains an integral part:

The survival — and prosperity — of the Indian nations has always flowed from their ability to choose freely how they would use their land and resources for collective benefit. If Indigenous peoples' economic activities and land use patterns — and their rights and interests — are seen in this context, then the conventional 'hunter-gatherer'-'frozen rights' analysis begins to wear thin ... .This means that the arbitrary line between subsistence use and commercial use of resources no longer exists. Resources within the territory were there to be used for the benefit of the people first and foremost. This could mean taking for personal use, for distribution within the community, or for commerce with other communities and peoples. In this sense the result was the primary objective, not the destination of the product.[206]

Protection of Aboriginal access to resources, though in diminished form, served the state only in so far as it kept Aboriginal people at a distance from the expanding settler economy and from dependence on the public purse. Some jurisdictions took this view to the extreme, believing that treaty Indians who were gainfully employed should, in turn, lose their treaty harvesting rights. In 1945, for example, the Ontario department of game and fisheries refused to issue trapping licences to Indian people working on the railway or in lumber camps.[207]

It is not surprising, given the barriers continually thrown up, that Aboriginal communities have consistently expressed frustration at their inability to develop healthy, self-sufficient economies. Not only did communities lose access to lands and resources in exchange for a limited land base (and, for many, no land base at all), but the guarantees provided in the treaties with respect to harvesting and access to new forms of economic enterprise were slowly eroded or completely denied. Moreover, when Aboriginal people sought wage labour outside their own communities, many were refused employment. Union practices, for example, did little to ameliorate the situation during this period.

In June 1958, for example, two organizers from the lumber and sawmill workers union visited the New Post Reserve north of Cochrane, Ontario, where 34 Indian men were cutting under a subcontract to Kimberley-Clark, and explained that those who did not join the union would have to leave immediately. As a result of this threat, 28 of the 34 men paid $29 each and $4 for monthly dues, while the remaining six returned to their homes at James Bay. It turned out that there was no clause in the original timber licence for the New Post Reserve specifying that Indian people would have to be hired, nor had any previous arrangement been made for an exemption to the union agreement, although the subcontractor had agreed orally with the department of Indian affairs to hire Indian labour. On the basis of a discussion with the Indian foreman, the department tried to secure a refund of the money collected, arguing that the organizers had used intimidation. As regional supervisor Fred Matters explained, the “wood belongs to the Indians and is on their own reserve”, and the primary purpose of the licence was to provide them with employment. He also pointed out that, because the men in question only worked seasonally, they would be compelled to rejoin the union every year for only a few weeks’ work. Apparently none of the men had understood what they were signing; as far as they were concerned, they had simply been exploited by white men.[208]

**Hydroelectric Development of the Nelson and Churchill Rivers**

While the enormous potential of Manitoba’s northern water resources for hydroelectric development has been recognized since the early part of this century, it was not until the late 1950s that hydroelectric development was seriously considered. Subsequent to numerous joint studies undertaken by the federal and provincial governments, Manitoba Hydro (the provincial utility) developed the Kettle project, in the mid-1960s, at Kettle Rapids in northern Manitoba, in anticipation of gaining approval for the much larger high level diversion of the Churchill River to the (Lower) Nelson River, with storage at Lake Winnipeg, Reindeer Lake and Southern Indian Lake on the Churchill River.

This diversion scheme met with serious opposition, however, focused on the concerns of the local Aboriginal community at Southern Indian Lake, which would have to be relocated, and on the environmental impact of flooding. Following the election of a new provincial government under the leadership of Ed Schreyer, Manitoba Hydro gained approval for a lower level Churchill River Diversion scheme. The South Indian Lake community, which was opposed to any flooding, failed to block the development, despite attempts to gain an injunction and appeals to the

federal government.

The Churchill River Diversion has subsequently become well known for its massive scale and detrimental effects on the northern Manitoba environment and the Aboriginal peoples who live there. Although the project directly affected the lands and livelihood of five treaty communities (York Factory, Nelson House, Norway House, Cross Lake and Split Lake) and one non-treaty community (South Indian Lake), they were not consulted, nor did they give approval for the undertaking.

Reserve and community lands were either flooded or affected by dramatic changes to levels in surrounding lakes and rivers, and traditional land use areas were damaged or rendered inaccessible.

In return, community leaders and members assert, they have gained little benefit, in the form of employment, business-related activity or a share of revenues from the project, and have instead been mired in a continuous negotiation and litigation process to obtain compensation for the damages.

The controversies surrounding the development did succeed, however, in raising public awareness of northern Aboriginal communities and concerns and about the detrimental effects of such development. The Northern Flood Committee was formed in 1975 to negotiate a compensation settlement for the affected First Nations communities and resulted in the Northern Flood Agreement (nfa), which was signed in 1977 between the treaty nations, Canada, Manitoba and Manitoba Hydro.

The nfa itself has been the subject of much controversy (in many respects the agreement has become the model of how not to reach resolution), as its history has been marked by little or no action in implementation of nfa obligations and a long, drawn-out (and continuing) process of arbitration to force governments to implement their obligations. In 1988, the parties attempted to reach a global settlement of virtually all outstanding elements; however, agreement was never reached. Currently, two communities have reached a settlement outside of this process, with the balance still attempting to do so.

Source: See Patricia M. Larcombe Cobb, “Northern Flood Agreement — Case Study in a Treaty Area”, research study prepared for RCAP (1995); James B. Waldram, “Native Employment and Hydroelectric Development in Northern Manitoba”, Journal

of Canadian Studies 22/3 (1987); and James B. Waldram, As Long as the Rivers Run: Hydroelectric Development and Native Communities in Western Canada (Winnipeg: University of Manitoba Press, 1988).

Related to such practices was the general attitude that northern resource-related jobs, such as those in hydroelectric development and mining, were for southern non-Aboriginal workers. As a report submitted to the provincial government in 1963 by the committee on Manitoba's economic future explained:

Industrial concerns in this area should not be expected to employ native labour which is not as productive as white labour ... .It is difficult enough to persuade large investors to put money in resource development in the north without expecting them to assume the added cost of solving the welfare problems of the native population.[209]

More recently, the organized labour movement has been trying to rectify past problems. In its written submission to the Commission, the Canadian Labour Congress (CLC) acknowledged that Aboriginal peoples have a right of self-government and a concurrent requirement for more lands and resources. As part of the latter goal, the congress is encouraging union initiatives that would remove current obstacles to the hiring of Aboriginal workers. At the same time, however, CLC is concerned about the impact of the implementation of Aboriginal rights on union members in the resource industries, particularly forestry and commercial fishing, as well as on union members in non-Aboriginal organizations that deliver public services to Aboriginal people.[210]

For the CLC and many Canadians, the interests of Aboriginal peoples must be balanced against the broader public interest. The difficulty for Aboriginal peoples, as we have seen throughout this section, is that any invocation of the common good has tended to leave them disadvantaged. The historical record shows that while Aboriginal communities contributed capital in the form of lands and resources to the accumulated wealth of Canada, they derived little benefit in return. Instead, Aboriginal communities have borne the brunt of the social, economic and environmental costs of development. Thus, not only did government policies and practices impede alternative economic pursuits, they generated and subsequently perpetuated dependence.

Many of the current conflicts over Aboriginal issues are an enduring reflection of the fundamental and forced separation of Aboriginal societies from the land. Land acquisition through treaties and other arrangements and subsequent

resource allocations to other interests have meant that Aboriginal people have been dispossessed not just of their lands. All the elements that encompass their relationship with the land have been expropriated as well: nationhood, governance, and territoriality; customary forms of social and community organization; and conceptual and spiritual views.

Our traditional laws are not dead. They are bruised and battered, but alive within the hearts and minds of the Indigenous peoples across our lands. Our elders hold these laws within their hearts for us. We have only to reach out and live the laws. We do not need the sanction of the non-indigenous world to implement our laws. These laws are given to us by the Creator to use. We are going to begin by using them as they were intended. It is our obligation to the children yet unborn.

Sharon Venne
Treaty 8 First Nation
Fort St. John, British Columbia, 20 November 1992

## 4.4 The Impact of Crown Land Management Systems

In the majority of the land, we are the sole users and occupiers. The government, with its various ministries, has studied and prepared management plans in which we have had no input. The majority of the management plans are not geared to meeting the First Nations' needs or priorities. They have forced us to be reactive instead of proactive.

Steven Jakesta
Manager, Dease River Band Council
Watson Lake, Yukon, 28 May 1992

As we have seen, the way lands and resources are controlled and allocated presents significant difficulties for Aboriginal peoples, who, with relatively few exceptions, do not have a share in jurisdiction or management. Our goal is to reconcile the interests of Aboriginal peoples with those of society generally. To begin, we examine Canada's system for managing lands and resources in an international context and identify the institutional constraints that need to be overcome.

Crown lands and resources are managed by provincial and territorial government agencies, acting on the Crown's behalf. These agencies contribute to the development of legislation and regulations, make land and resource use

policies and issue guidelines. They grant the leases, licences and other forms of tenure agreements that permit private corporations, groups and individuals to use resources such as trees, water power, oil and natural gas, or to graze their livestock on public lands. They also monitor the subsequent operations. These same agencies control access to and use of parks, forest reserves and other protected areas. Access to Crown lands is permitted for many purposes, including hunting, fishing, trapping, boating and recreational snowmobiling, but government agencies set and enforce policies and regulations for all such activities.[211]

### *State management and open access*

Canada's system of state property and open access is similar to that of, among others, the United States (at least in federal lands west of the Mississippi) and Australia. But no other jurisdiction has such a large percentage of lands and resources under state control. More than 80 per cent of our country — millions of square kilometres — remains Crown land. Because of this geographic reality, Canadians have developed unique expertise in this kind of property regime.

The prevailing Canadian system is not the only possible resource regime, although it is generally considered to be the most appropriate. In Argentina, which has many similarities to Canada in terms of size and resources, most land is private property. Cattle ranches are enormous even by North American standards, and what would be grazing rights on public lands in Alberta or British Columbia are private rights in Argentina. Forested lands, although not nearly as extensive as in Canada, are also under private ownership. In the former Soviet Union and East Bloc countries, by contrast, all lands and resources belonged to the state, all resource users worked as state employees and there were few rights of open access.[212]

Our state property system is not without its critics, who suggest that it is simply a private property regime under a different guise. Important resources such as forests, they argue, are effectively controlled by private interests under long-term tenures, and those interests are becoming increasingly concentrated. In British Columbia, according to the 1976 Royal Commission on Forest Resources, 10 companies held 59 per cent of all harvesting rights on Crown lands. By 1990, that share had increased to 69 per cent.[213] In Nova Scotia and New Brunswick, vast tracts of forest land have been held under virtually perpetual concessions since the last quarter of the nineteenth century.[214] The effects of concentration have been criticized by groups as diverse as small

sawmill owners and independent loggers, mill workers, environmentalists, and Aboriginal people. The critics do not always (or even often) agree among themselves. But they do argue that it has been consistently difficult for small producers to gain access to the woodlands and that forest conservation has suffered badly in the process.

Conflict between the state and local communities over the control of forests is a worldwide phenomenon, one with a very long history. In the European countries from which settlers came, the term ‘forests’ meant both designated areas of forested land and open waste lands that were not suited to agriculture. Such areas were originally administered through complex laws and customs (which in England were independent of the common law) governing the rights of monarchs, lords, churches and communities to hunt and fish, to graze livestock, to cut timber or firewood, and to make charcoal.[215]

By their nature, forests were also a zone of freedom; think of Robin Hood and Sherwood Forest.[216] In that sense, they were the only genuinely public lands, that is, lands to which there were public rights more or less autonomous from those of the state (represented by the Crown). As medieval monarchs sought to assert control over forests in order to extract more revenue, their subjects fought back. This was one of the concerns at issue in *Magna Carta*; thus, in 1215, King John’s barons forced him to assent to a forest charter that would uphold customary laws. (Another clause in *Magna Carta* prevented the monarch from establishing new private fisheries in public rivers.[217])

Although the terms ‘Crown lands’ and ‘public lands’ are now used synonymously, such was not always the case. Crown lands were state lands, meaning not only the estates of the feudal monarch, but all lands over which the monarch claimed paramountcy and the right to derive revenue. Monarchs (but not always their subjects) considered forests to be “waste or ungranted lands of the Crown”. The trees and other resources could be privatized as a source of revenue for the state (originally the monarch), and such lands could also be privatized by being granted, cleared of their forest cover and turned into farms. This is what the Crown meant by public lands.

This second sense of the term is the one that became common in the Anglo-American colonies such as New York and that has come to predominate in Canada. It is not hard to see why. In contrast to Europe, all of eastern North America was forested land when the colonists arrived. The amount of “waste and ungranted land” was vast. While the forests were clearly to be a source of revenue and of supplies to the Crown (white and red pine timber in both the

French and Anglo-American colonies was reserved as masts for the royal navy), the forests, at least in the Anglo-American colonies, at first existed as an enormous reservoir of lands to be granted for agriculture.

### *Excluding customary uses*

This approach had significant consequences for Aboriginal people and their customary laws — their rights to use the forest and forest clearings. While Aboriginal rights were generally respected until treaties were made (although not, as we have seen, in areas like British Columbia where there were no treaties), once lands had entered the category of "waste lands of the Crown", those customary rights were drastically diminished. Not only did Aboriginal people lose access to agricultural lands; the farming that took place promoted deforestation, which in turn drastically affected wildlife habitat. Deer and moose, for example, were gone from most of the eastern seaboard by the end of the seventeenth century.

The rise of industrial-scale forestry in the nineteenth and twentieth centuries was an entirely new phenomenon, one unknown to medieval Europe and colonial North America. It too has greatly diminished the ability of Aboriginal people to follow their customary laws and to use the resources of the forest. The role of the state management system is to make decisions about allocation, and in making those decisions, Crown agencies have consistently ranked Aboriginal interests at the very bottom. In this respect, state management has meant that forests have become resources to be protected against their former users.

This is a controversial subject in other parts of the post-colonial world, where new states are also banning or limiting customary uses of the forest in the interests of large-scale forestry. In fact, it has been argued that foresters and other resource professionals are bringing with them to their consulting work overseas a strong predilection for comprehensive government resource management on the North American model, one that trivializes customary law.[218]

In Canada, as in the developing world, a policy to protect resources against their former users dictates both how resource rights are allocated and how certain kinds of development are disallowed. Until very recently in Canada, for example, Aboriginal customary uses were consciously excluded by regulation and policy from parks and protected areas established on Crown lands. As a result, parks have been extremely unpopular among Aboriginal people not only

in Canada but also in Africa, for example, where they are seen as private preserves for the rich. In Zambia and Zimbabwe, recent government programs have tried, with considerable success, to reconcile park management with the economic needs of local residents.[219]

The Yellowstone model for designating and managing park lands is a significant part of the corporate memory of land and resource management agencies in Canada, one that until very recently has made it difficult to bring Aboriginal people into management decisions, as it is based on professional management. In British Columbia, the 17,683-hectare Anhluut'ukwsim Laxmihl Angwinga'asanskwhl Nisg_a'a (Nisg_a'a Memorial Lava Bed Provincial Park) was set apart in 1991 in the Nass valley, north of Terrace. The Nisg_a'a Tribal Council approached the provincial government to create the park, and it is being managed jointly. The national parks set apart as a result of recent land claims agreements in the Yukon and the Northwest Territories are also improving relations between park staff and Aboriginal people who will be sharing in their management.[220]

Although parks have very high levels of support in urban areas for both conservation and recreational reasons, they have been deeply unpopular with many residents of rural and remote parts of Canada who, like Aboriginal people, have felt that their customary uses of particular areas were being eliminated. State management of natural resources and concomitant disputes over issues such as industrial forestry and park creation have thus revived a centuries-old conflict over customary rights. This debate pits public lands in the Crown definition — in this case, the right of the state effectively to privatize the forest by granting long-term tenures or setting aside large areas in the public interest (but to which public access is strictly controlled) — against public lands in an older sense — the sense in which communities and individuals have customary rights of access to the forests and resource use is subject to community, not state, control. Much of the current discussion of decentralizing forest management in British Columbia and other regions of Canada, to which governments have been responding in a variety of ways, flows from this tension.

### *Differing views of common property*

As communities worldwide debate who should benefit from resources and resource access, differing views of common property have become apparent. Many Canadians, and not just Aboriginal people, now consider trees and other natural assets common property resources. In its brief to the Commission, the

Ontario Federation of Anglers and Hunters classified fish and other wildlife as “common property resources” since, in our legal system, they cannot be “owned” by any one individual or group. The federation went on to elaborate its belief that wildlife should therefore be managed by the state on behalf of all members of the public.[221] This is somewhat different from the views of supporters of community forest initiatives, who give greater primacy to local, rather than state control. Others who appeared before the Commission, such as Lorne Schollar of the Northwest Territories Wildlife Federation, implied that the state system, when coupled with Aboriginal rights, effectively discriminates against the rights of local non-Aboriginal people to harvest fish and other wildlife.[222]

The classic critique of common property systems is an influential 1968 article entitled “The Tragedy of the Commons” by Garrett Hardin, then a professor of human ecology at the University of California.[223] Hardin argued that in a system supporting a publicly owned resource — a commons — the pursuit of private interests leads automatically to resource depletion. He used the example of herdsmen on a common pasture, each of whose rational pursuit of his own best interests would lead him to increase the size of his herd, thus resulting in the ruin of the commons for all. Hardin cited overgrazing on public lands in the western United States and overfishing in the oceans as examples.

The examples have particular resonance for Canadians in light of recent troubles in the Atlantic fishery. The historical examples cited earlier in the chapter — the decline of the sturgeon fisheries in various inland lakes — also appear to bear out Hardin’s thesis. Another example from the recent historical literature concerns the Bay of Quinte in Ontario. At the turn of the century, fishers there were anxious to preserve the viability of their industry but were unable to practise conservation on an individual level because of the need to cover operating costs and turn a profit. If they conserved fish stocks, their competitors simply reaped the benefit by landing more fish.[224]

The Bay of Quinte fishery was originally not managed at all and was therefore not common property, but rather a resource to which there was completely open access. This is an important distinction. Common property is actually private property for the group, since it means that the group controls the resource and excludes all non-members from use and decision making.[225] In the case of the Bay of Quinte, the department of fisheries ended uncontrolled access by bringing in conservation and restocking measures, and the fishery partially rebounded. There is considerable historical justification, then, for federal and provincial decisions to manage access to these kinds of resources

in order to counteract species depletion.

As we saw earlier, however, control of open access has had major implications for the Wabanaki, the Haisla, Dene and all other Aboriginal peoples, who had existing common property systems that functioned under their customary laws. Swept up in the movement to control open access, they were severely penalized by the state. As with the forests and other resources, when management agencies subsequently made decisions about the allocation of wildlife, all other users were given higher priority, whether they were commercial fishers or trappers, tourist operators or recreational hunters and anglers. It is only with the *Sparrow* decision that this order of priorities is being re-examined.

The purpose of Aboriginal management systems, based on traditional ecological knowledge, was to counteract resource depletion and ensure the survival of the group. Aboriginal people have not abandoned their traditional tenure and management systems, either in concept or practice. These systems exist today (where the means and the access to exercise them still survive), although often in semi-covert fashion and in the context of a mixed economy. In various parts of the country, such as northwestern Ontario and southeastern Manitoba, where Ojibwa people continue their traditional practice of planting, tending, harvesting and cultivating wild rice, Aboriginal peoples still manage their common property by employing “a complex set of customary arrangements”.[226]

If we look again at the maps of the Lake Huron region presented earlier in the chapter (Figures 4.6 and 4.7), we can see that traditional land use areas — the band territories marked on the 1849 map (Figure 4.6) — surround the reserves along the northern and eastern shores of the lake. They are also adjacent to modern cities and towns like Sudbury and Blind River. These boundaries do not appear on any government maps, but it is within them that First Nations people hunt, fish, trap, gather, cut firewood and perform cultural ceremonies, and it is from these traditional territories that First Nations people want to derive the resources to build their reserve-based economies. The present state management system does not recognize traditional land use areas, and resource allocation decisions are made within that system based on other criteria.[227]

### *The theory and practice of land and resource management*

While many employees of resource management agencies know that

Aboriginal people living on reserves continue to harvest on Crown lands, they are generally unaware that most do so in accordance with their own rules of common property. Nor are they aware that Aboriginal people generally consider state rules an unfortunate imposition. In part, this is a reflection of the way those agencies are structured. Authority is centralized and flows from the top down, and the environment is reduced to conceptually discrete components, such as forests, parks, fish and wildlife, that have traditionally been managed independently (although less so as governments commit to principles of sustainable development or holistic management).

This arrangement reflects long-standing government policy and practice as well as the way resource managers are trained as foresters, biologists, planners and technicians. Managers bring to their jobs the systems of knowledge and understanding that prevail in those disciplines, and those systems have become part and parcel of the corporate memory and institutional interests of resource management agencies.

These disciplines share certain common objectives, which are traceable to theories of scientific management that date from the ‘progressive era’ of the late nineteenth century. As summed up by Robert McCabe, former chair of the department of wildlife ecology at the University of Wisconsin, an influential training ground for many Canadian biologists, “the basic responsibility of professionals is to the resources, not to resource users. If professionals exercise that responsibility, the resource user is automatically served”.[228]

This focus on resources has had many positive benefits, but one result was that for a long time managers favoured efficiency in resource use above other considerations, and based on their professional training, managers defined what efficiency is. We have seen, for example, how Aboriginal people lost traplines to ‘more efficient’ non-Aboriginal trappers. Even now, government licensing systems favour economies of scale. ‘Use it or lose it’ has been the consistent message from resource managers to Aboriginal people and indeed all small commercial producers in rural and northern regions, including wild rice harvesters, logging contractors and tourist operators. Questions of resource allocation continue to be influenced, then, by the doctrine of efficiency.

Another essential feature of modern management systems is the fundamental divide between managers and users. Managers in effect become the owners (or at least custodians) of resources on public lands, while those who actually use resources — hunters, fishers, recreational boaters, trappers, loggers — become their clients. As we saw with parks (and forest and game reserves), the

guiding principle is that the best way for state managers to protect resources is to control or exclude users.[229] This principle, which assumes that only managers have knowledge (which is scientifically based), gives little weight to the experience and customs of all people (not just Aboriginal people) who harvest resources.

### *The effect on Aboriginal governance*

When users have constitutionally protected rights to harvest resources, as Aboriginal people do, conflict is guaranteed. In its brief to the Commission, World Wildlife Fund Canada pointed out that when resource managers discuss biologically sustainable and culturally desirable levels of harvest with Aboriginal groups, "It is important that the idea of a quota which is enforced by a 'policeman' who distrusts the harvester, be avoided as much as possible. The result is often resentment and non-compliance."[230]

Like the control of reserve lands, which has been exercised by the department of Indian affairs, state management of natural resources has had a negative impact on Aboriginal systems of governance. The Commission acknowledges that conservation of resources has been an important goal. Nor would we deny that individual Aboriginal people have occasionally been involved in the abuse of resources. As Patrick Madahbee, former grand chief of the Robinson-Huron Treaty First Nations, reminded a recent treaty gathering in Sault Ste. Marie, Ontario, Aboriginal people have an obligation to exercise their harvesting rights in a responsible manner.[231] But because government resource managers have been unaware of (or have discounted) surviving Aboriginal common property institutions on public lands, Aboriginal people have had no reason to respect the state system. This in turn has made it difficult for Aboriginal governments to maintain or enforce their own rules among their own membership. The result, in some cases, has been the worst of all possible worlds.

## 4.5 Conclusion

The distinctive relationship between Aboriginal people and the land — where they live, what they do there, and the connection between land, livelihood and community — has been problematic for Canadian society since the days of the early settlers. In the final sections of this chapter, we propose an approach to resolving the issues for the long term. We recommend changes to the current system of Crown land administration and jurisdiction, in the context of a new approach to treaty making and to the implementation and renewal of historical

treaties. These changes make sense not just for Aboriginal peoples, but for all Canadians. Many individuals and groups expressed concerns about the present system at our own hearings. Canadians may differ about the exact nature of the changes needed to address these concerns, but the outlines are clear. They want a great deal more control over broad policy decisions about the zoning and allocation of resources on Crown lands, and particularly at the local level, they want a great deal more involvement in land and resource management in general.

Aboriginal peoples have been leading this movement for structural change, as they seek to build their own communities and economies in a sustainable manner. Experiments in regional public government, shared jurisdiction and shared management — now being introduced as part of land claims agreements in the north or developed in partnership with some provincial governments — are largely the result of pressure from Aboriginal peoples. These experiments are a positive model for us all, but structural change is not occurring nearly quickly enough. While the legal, political and institutional constraints discussed here continue to play a major role in hampering substantive change, current federal government policies for dealing with Aboriginal claims, coupled with the institutional interests of the Department of Indian Affairs and Northern Development, present a much more fundamental obstacle. In the next section, we examine how resistance by Aboriginal peoples to the loss of their lands and resources led eventually to modern claims policies, and why those initiatives remain inadequate.

## 5. The Inadequacy of Federal Claims Processes

Indian grievances are not new to Indians nor are they new to the Department of Indian Affairs. The rest of us, however, have not known much about them and the Indians have never been in a position to put their claims forward in a clear and forceful way which would make them fully understandable to us ... .Over the years, the relationships between Indians and the government have been such that strong feelings of distrust have developed. This distrust goes far beyond distrust of government to the entire society which has tried, since day one, to assimilate Indian people. Indian people, who once dwelt proud and sovereign in all of Canada, have resisted with stubborn tenacity all efforts to make them just like everybody else ....They have given up much in this country, and they feel that the assistance they receive from government must be seen as a right in recognition of this loss and not merely as a handout because they are destitute. In short, the grievances are real, the claims arising from them are genuine, and redress must be provided if our native peoples are to find their

rightful place in this country ....Recent experiences in Kenora, Cache Creek and Ottawa must have made even the most indifferent Canadian aware that native frustration is building up and that we cannot expect that native people will much longer confine their misery to their own communities as they have in the past.[232]

## 5.1 A Background of Aboriginal Protest

In 1947, leaders from major Indian rights associations and the Iroquois Confederacy travelled to Ottawa to appear before a special joint committee of the Senate and the House of Commons struck the previous year to consider amendments to the *Indian Act*. These leaders presented oral and written briefs on a host of topics, including the resolution of grievances dealing with treaties, lands and resources. Their submissions focused on the following issues:

1. resolution of the British Columbia Indian land title question;

2. resolution of the land ownership dispute at Kanesatake (Oka);

3. Iroquois Confederacy claims to sovereign nation status as British allies based on various wampum belt treaties, the *Royal Proclamation of 1763*, the Haldimand Grant (1784) and Simcoe Patent (1763), Jay's Treaty (1794) and other legal instruments;[233]

4. government's failure to fulfil specific treaty obligations;

5. complaints concerning improper government management of reserve land transactions and band trust funds;[234] and

6. complaints about government discrimination against Indian war veterans, who were not considered eligible for veteran land grants (see Volume 1, Chapter 12).

Thus, Aboriginal claims are far from a recent phenomenon. Fifty years later, these issues, as well as many others involving lands and resources, remain unresolved. How did this happen? Why have so many attempts to deal with the problem failed?

Aboriginal peoples have consistently protested their exclusion from their traditional territories, the continuing alienation of reserve lands and resources,

and governments' failure to honour the terms of treaties. Aboriginal peoples have also protested the characterization of these disputes as 'claims', since this suggests that it is the undisputed rights of others that are being challenged, whereas it is the established rights of Aboriginal peoples that are being asserted. Chief Joe Mathias of the Squamish Nation in British Columbia made the point in this way: "We're not talking about being granted our rights — they *are* our rights!"[235]

Aboriginal peoples have used petitions, protests and direct action in their continuing attempts to secure a just resolution of their grievances. But apart from intermittent and ad hoc attempts to deal with individual issues, Canada paid scant attention to Aboriginal claims until after the Second World War.[236] In fact, strong measures were taken at times to suppress any assertion of Aboriginal rights and title. In the 1920s, for example, when Iroquois representatives were having some success in promoting their cause at the League of Nations, the council house at the Grand River was invaded by the RCMP and the traditional longhouse chiefs replaced by an elected council. Shortly afterward, the *Indian Act* was amended to make raising funds to advance an Indian claim or retain a lawyer for that purpose an offence.[237]

Following the 1946-1948 hearings, the federal government made serious and laudable attempts to streamline the administration of Indian affairs and to better the condition of reserve residents through improvements in education and social services. But at the same time, senior officials of the Indian affairs branch did their best to forestall any attempts to deal with broader land and resource issues. Deputy minister Hugh Keenleyside found the 1947 parliamentary hearings particularly unsatisfactory because they were a national platform for "venal" and "self-serving" Indian politicians to sound off on issues that he considered to be unimportant.[238]

The special committee recommended the creation of an independent administrative body to deal with Indian grievances, to be modelled on the U.S. Indian Claims Commission, which had begun operations in 1946.[239] The creation of such a body enjoyed multi-party support in the House of Commons, with prominent opposition members (such as John Diefenbaker) speaking in its favour

along with Liberal members of Parliament from the special committee.[240] The Indian affairs branch did conduct an internal investigation into the types of matters that might be brought before such a commission; that investigation

actually foreshadowed modern claims categories by distinguishing, for the first time, between specific grievances relating to treaties and reserve lands and resources and larger claims dealing with issues of Aboriginal title. But the claims commission idea was rejected at senior levels of the department, a decision announced by Walter Harris, minister responsible for Indian affairs.[241] Harris and his officials expected that Indian people would instead pursue treaty and land claims cases in the Exchequer (now Federal) Court of Canada. This became possible, at least theoretically, in 1951, when the notorious section prohibiting the use of band funds to advance claims was dropped from the newly revised *Indian Act*.[242]

The repeal of that section, however, was the only real concession to protests about land and resource issues. During formal consultations between 1948 and 1951 on *Indian Act* revisions, the Indian affairs branch tried to discourage participation by the Indian rights associations — a hostile attitude that continued over the following decade. Thus, at a series of regional Indian conferences held across Canada in 1955-1956, officials set the agenda items in advance, and questions relating to treaties, land claims or special rights were avoided or deflected. When the Indian leadership finally gained another chance to appear before Parliament — during the joint Senate-House of Commons hearings of 1959-1961, co-chaired by member of Parliament No'l Dorion and Senator James Gladstone (a Treaty 7 beneficiary from the Blood reserve in southern Alberta and the first member of a Treaty First Nation appointed to the Senate) — virtually all of their submissions reiterated long-standing concerns about land claims, violations of treaties and unresolved Aboriginal title issues. Chief James Montour of Kanesatake spoke in Mohawk about the land dispute at Oka, introducing in evidence the same historical documents that had been filed at the 1947 parliamentary hearings. Spokesmen for the British Columbia allied tribes once again raised the Indian land question in that province, and the Six Nations Confederacy reiterated its assertions of sovereign nation status and border-crossing privileges.[243]

Finally, the federal government began to take these specific grievances seriously. Some of the credit belongs to James Gladstone, who used his position on the committee — and his influence with certain ministers of the Conservative government that had appointed him — to lobby for substantive change.[244] In accordance with the committee's recommendations, draft legislation prepared in 1962 would have created a three-member administrative tribunal, the Indian Claims Commission. The proposed commission (of which one member was to be Indian) would have been empowered to hear a broad range of grievances, with no restriction on claims arising from before

Confederation. As a concession to Aboriginal oral traditions, strict evidentiary rules would not be followed, and the commission would be allowed to develop its own procedures. However, it was not clear that broader issues of Aboriginal title (as in British Columbia) could be dealt with, and there was to be no renegotiation of existing treaties. Also, claimants were to be limited to Indian people as defined by the *Indian Act*, thus excluding Métis people. Internal policy debate centred on whether the commission (like its American counterpart) should have binding decision-making powers. Although initial proposals had favoured such powers, the draft legislation was altered so that the commission would simply make recommendations to Parliament concerning decisions and awards.[245]

The Diefenbaker government fell before the legislation could be introduced, but the new Liberal government of Lester B. Pearson brought forward similar legislation, Bill C-130, in December 1963. The proposed Indian claims commission — now expanded to five members — was to have jurisdiction over claims concerning unextinguished Indian title, the expropriation of reserve lands without compensation or consideration of Indian interests, the failure to discharge the obligations of treaties or other agreements, the improper use of trust funds, and the general failure of the Crown to act fairly and honourably with the Indian people. As before, however, these categories excluded the renegotiation of existing treaties, and claims could be brought by *Indian Act* bands only, not by national or regional organizations. Bands were to be given two years to bring forward their claims.

The Pearson government's bill differed in two important respects from the Conservative's proposal. One was that the commission was to have binding decision-making powers. The second was a proposed appeals process. Either side could appeal jurisdictional questions to the Exchequer Court and the Supreme Court of Canada. Appeals concerning the unreasonableness of an award, or the failure to grant an award, could be taken to a new Indian claims appeal court to be composed of judges of the Exchequer Court, to be created along with the claims commission.

Following first reading, there was an 18-month delay as copies of Bill C-130 were sent to all Indian bands and organizations (as well as other interested bodies) for comment. The legislation was reintroduced to Parliament in June 1965 as Bill C-123. Several amendments had been made in response to criticism, including an extension to three years of the time limit for filing claims, as well as provisions that one of the five commissioners be Indian and that financial assistance be provided to help claimants document their grievances.

However, this bill died on the order paper when the Liberal government went to the electorate in the fall of 1965.

The re-elected Pearson government remained committed to the idea of establishing an Indian claims commission over the next two years, but the continuing pressures of minority government left the issue relatively low on the parliamentary agenda. In addition, the British Columbia Native Brotherhood had asked the government to delay submitting the necessary legislation. Because the proposed commission would not have jurisdiction over claims against the provinces, and because it was not clear whether their claim was against British Columbia or Canada, many Indian leaders there believed the title issue in that province should be settled by negotiation before the claims commission bill became law. However, negotiations never got off the ground, in part because of the federal government's insistence that at least 75 per cent of B.C. Indian people be represented in negotiations by a single organization, a requirement that proved to be an insurmountable problem.[246]

Two subsequent events caused change, though for widely different reasons. These were the Trudeau government's white paper on Indian policy in June 1969 and the *Calder* decision in 1973. The white paper proposed the termination of Indian status under Canadian law and a complete overhaul of the relationship between Indian people and Canadian society based on liberal ideals of equality (see Volume 1, Chapter 9 and Chapter 2 in this volume). Developed by the government as a whole, not just the department of Indian affairs, the white paper, which was totally and angrily rejected, denied the existence of Indian title and considered other claims to be of only limited significance. As a result, efforts within the Indian affairs department to bring forward an Indian claims commission bill, under way since 1961, were suspended during the winter of 1968-1969.[247]

Although the white paper policy did call for the appointment of a claims commissioner, there was little similarity between this and earlier legislative proposals. The commissioner, Lloyd Barber of the University of Saskatchewan, appointed by order in council in December 1969, was given a mandate to receive and study *specific* grievances (but not those involving Indian title) and to recommend alternative measures to provide for the resolution of claims. The Barber commission continued until 1977, though the fact that it was an exploratory and advisory commission only, rather than one with explicit adjudicatory powers, was strongly criticized by Indian leaders. Most Indian organizations were unwilling to proceed with negotiations of claims in the absence of a more concrete mechanism for resolving them.[248] In one area of

Canada, however, a successor to the Barber commission has remained in operation. The Indian Commission of Ontario was created in 1978 as a tripartite council of representatives of First Nations, Ontario and Canada. Its powers remain confined to facilitating and assisting in negotiations.[249]

The federal government was forced to reconsider at least some elements of its policy on land claims because of *Calder*, a decision that confirmed that Indian title is a valid right in common law. In 1990, the Supreme Court of Canada summarized the effect of these events on the development of claims policy:

For many years, the rights of the Indians to their aboriginal lands — certainly as legal rights — were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments, and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For 50 years after the publication of Clement's *The Law of the Canadian Constitution*, 3rd ed. (1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* (1969), although well meaning, contained the assertion (p. 11) that 'aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community'. In the same general period, the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument: see the *Quebec Boundary Extension Act, 1912*, S.C. 1912, c. 45. It took a number of judicial decisions and notably the *Calder* case in this court (1973) to prompt a reassessment of the position being taken by government.

In the light of its reassessment of Indian claims following *Calder*, the federal government on August 8, 1973, issued 'a statement of policy' regarding Indian lands. By it, it sought to 'signify the Government's recognition and acceptance of its continuing responsibility under the British North America Act for Indians and lands reserved for Indians', which it regarded 'as an historic evolution dating back to the Royal Proclamation of 1763, which, whatever differences there may be about its judicial interpretation, stands as a basic declaration of the Indian people's interests in land in this country' ... .See *Statement made by the Honourable Jean Chrétien, Minister of Indian Affairs and Northern*

*Development on Claims of Indian and Inuit People*, August 8, 1973. The remarks about these lands were intended 'as an expression of acknowledged responsibility'. But the statement went on to express, for the first time, the government's willingness to negotiate regarding claims of aboriginal title, specifically in British Columbia, Northern Quebec, and the Territories, and this without regard to formal supporting documents. 'The Government', it stated, 'is now ready to negotiate with authorized representatives of these native peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit will be provided to native peoples in return for their interest.'

It is obvious from its terms that the approach taken towards aboriginal claims in the 1973 statement constituted an expression of a policy, rather than a legal position: see also Canada, Department of Indian Affairs and Northern Development, *In All Fairness: A Native Claims Policy — Comprehensive Claims* (1981), pp. 11- 2; Slattery, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 726 at p. 730. As recently as *Guerin* v. *The Queen* (1984), 13 D.L.R. (4th) 321, [1984] 2 S.C.R. 335, [1984] 6 W.W.R. 481, the federal government argued in this court that any federal obligation was of a political character [i.e., not enforceable in the courts].[250]

## 5.2 Three Existing Claims Policies

There are now three published federal policies relating to Aboriginal claims. Provinces also participate, to varying degrees, in claims negotiations — as in the British Columbia Treaty Commission — but there are as yet no published provincial policies.[251] The following three federal policies flow from the government's original statement of claims policy in 1973:

1. The comprehensive claims policy is intended to deal with claims based upon unextinguished Aboriginal title. As will be seen, these are effectively claims to negotiate a treaty with the Crown. First Nations and Inuit may advance a comprehensive claim.[252]

2. The specific claims policy is intended to cover claims based upon failure to discharge treaty obligations, improper alienation of reserve lands or assets, and other claims based upon breach of "lawful obligation" by the federal government. Such claims can be advanced by First Nations only.[253]

3. Claims of a third kind were formally acknowledged in 1993. They are

amorphous in nature, described as providing “administrative solutions or remedies to grievances that are not suitable for resolution, or cannot be resolved, through the Specific Claims process”. While they lack both definition and process, it is clear that such claims can be advanced only by First Nations.[254]

Notable procedural features are common to all three policies:

• The burden of proving a claim is on the Aboriginal claimants.

• Government determines the validity of the claim (without prejudice to any position that it might subsequently advance in court proceedings).

• Government can accept a claim for negotiation as an alternative to litigation; litigation takes claims outside the scope of the policies.

• Government determines the parameters of what can be negotiated.

• Existing treaties will not be renegotiated.

• Government determines the basis for compensation.

• Negotiation funding can be provided to claimants in the form of loans.

• Third-party interests are not to be affected by a claims settlement.

Over the years since their inception, these claims policies and processes have been much and justly criticized, but they have shown themselves particularly resistant to change.[255] As the Indian Commission of Ontario noted in 1990, “What all the intervening review, comment and recommendations [about claims policy] have most in common is the fact that they have all been ignored”.[256]

A quick review of the three policies illustrates their deficiencies. Many claims can be abandoned at the discretion of the government. This is almost always the case with specific claims, where the parties might grapple for years with the compensation guidelines, only to have these jettisoned if the government determines to settle a claim and make a lump-sum offer. The significant role of the department of justice in advising on the validity of claims and appropriate compensation is seen by claimants as a clear conflict of interest, especially given the lack of funding available to them for litigation.[257]

In addition, it will be seen readily that there is no federal process to deal with Métis claims, although there are claims that need to be addressed (see Volume 4, Chapter 5). This supports the complaint advanced by all Aboriginal groups that federal policies are exclusionary in nature by virtue of the categories government has established unilaterally. Where the policies do not explicitly exclude certain groups or certain types of claims, subsequent interpretation of the policies by the departments of Indian affairs and justice has resulted in *de facto* exclusions, such as the government's refusal to deal with treaty harvesting rights as claims.[258] Part of the solution would be more general processes, accessible to all Aboriginal groups, in respect of their Aboriginal, treaty and other rights.

These factors have combined, over the years, to make the claims process a dilatory and frustrating one for all concerned. Although there have been settlements, and while the rate of settlements has increased in recent years, there has not been any significant policy change, and the outlook remains bleak. In central and eastern Canada alone, for example, the Indian Commission of Ontario notes that only 13 of 215 specific claims submitted have reached settlement. "This equates to less than one settlement per year, an alarming figure considering that 124 claims remain under review or negotiation."[259]

The delays that plague claims resolution are notorious among those involved with the process.[260] They are not so well known to the public, except when tensions reach the breaking point. There have already been tragic consequences, as with the shooting deaths of a Quebec police officer at Kanesatake in 1990 and an Aboriginal protestor at Ipperwash Provincial Park in Ontario in 1995. Even the extensive press coverage of the Oka crisis was not successful in communicating the fact that the issue was a land claim the Mohawk Nation had been advancing for nearly two centuries. The claim did not fit into any of the policy pigeon holes, however, and repeated intrusions into their territory brought some Mohawk people to the point where armed resistance seemed valid. In the case of Ipperwash, the federal government's unconscionable delay in fulfilling its promise to return reserve lands, originally expropriated by the military in 1942, to the Kettle and Stoney Point First Nation contributed to the decision by some of its members to occupy the adjacent provincial park. The Commission rejects violence as a tactic for redress of grievances. But it is essential that Canada adopt policies and procedures to usher in an era of true coexistence. Processes must be established immediately to address all Aboriginal rights and title issues. These processes

will require independent supervision, adjudication, funding and non-adversarial dispute resolution.

### *The comprehensive claims process*

As originally defined by government and set out in the 1981 publication, *In All Fairness*, a comprehensive claim is one based on unextinguished Aboriginal title and is, in effect, a request for the negotiation of a treaty. This is reinforced by subsection 35(3) of the *Constitution Act, 1982*, which recognizes and affirms existing Aboriginal and treaty rights: "'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired".

The comprehensive claims policy has three elements:

1. the criteria for acceptance under the policy;

2. the rights the Aboriginal group in question is asked to relinquish; and

3. the type and quantity of benefits the federal government will consider providing the Aboriginal group in exchange for the relinquishment of the group's rights.

Criteria for acceptance of claims

Under the comprehensive claims policy (as amended in 1986), the minister of Indian affairs will determine whether to accept a claim on advice from the minister of justice about its acceptability according to legal criteria. An Aboriginal group is therefore expected to submit a statement of claim that complies with the following requirements:

• the claimant has not previously adhered to treaty;

• the claimant group has traditionally used and occupied the territory in question, and this use and occupation continue;

• a description of the extent and location of such land use and occupancy together with a map outlining approximate boundaries; and

• identification of the claimant group, including the names of the bands, tribes or communities on whose behalf the claim is being made, as well as linguistic and

cultural affiliation and approximate population figures.[261]

This list might suggest relatively liberal criteria for accepting claims, but in practice the criteria used by the department of justice to assess validity are more rigorous, set out in the 1979 Federal Court decision in *Baker Lake*.[262] Under this decision, as elaborated by the federal government, an Aboriginal group must demonstrate all of the following:

• It is, and was, an organized society.

• It has occupied the specific territory over which it asserts Aboriginal title from time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.

• The occupation of the territory is largely to the exclusion of other organized societies.

• There is continuing use and occupancy of the land for traditional purposes.

• Aboriginal title and rights to use of resources have not been dealt with by treaty.

• Aboriginal title has not been extinguished by other lawful means.[263]

The last part of this test appears to have been somewhat altered by the 1990 *Sparrow* decision, which held that if the federal government's position is that Aboriginal title has been eliminated by "other lawful means", then its intention to extinguish Aboriginal title must have been "clear and plain". Federal policy continues to reflect other parts of the *Baker Lake* decision, however, despite Supreme Court decisions like *Simon* and *Bear Island* that implicitly reject evidentiary tests for Aboriginal claims that are impossible to meet in the absence of written evidence.

In practice, the federal government has applied the policy with varying degrees of stringency, depending on its broader political agenda. For example, it has negotiated and settled the Tungavut Federation of Nunavut claim in the eastern Arctic on the basis that Inuit had historically used and occupied all the lands now included in the new territory of Nunavut. In fact, as the Indian Specific Claims Commission has pointed out, the southwestern portion of the territory

just north of the sixtieth parallel continues to be traditionally used and occupied by Athabasca Denesuline (Dene) and Sayisi Dene, whose communities are in northern Saskatchewan and Manitoba. The government has thus far refused to acknowledge that Denesuline have any treaty or Aboriginal rights within the territory in question.[264]

As well, the geographic criteria for claims validation have had a negative impact on the public perception of Aboriginal issues. A popular misconception in British Columbia, for example, is that Aboriginal people are claiming 110 per cent of the province.[265]

What Aboriginal people must relinquish

As discussed in our special report, *Treaty Making in the Spirit of Co-existence*, the Crown's interpretation of the treaty relationship was, historically, that Aboriginal nations had received specified benefits in exchange for a blanket extinguishment of their title or rights. In keeping with this practice, the original comprehensive claims policy specified that an Aboriginal group must surrender all Aboriginal rights in return for a grant of rights specified in a settlement agreement. The government has moved very little from this position. In response to widespread objections by Aboriginal people and the Coolican report in 1985, the amended federal policy allows for an "alternative" to the surrender of all Aboriginal rights — "the cession and surrender of Aboriginal title in non-reserved areas", while "allowing any Aboriginal title that exists to continue in specified reserved areas, granting to beneficiaries defined rights applicable to the entire settlement area".[266] The policy also notes that the only Aboriginal rights to be relinquished are those related to the use of and title to lands and resources. In practice, however, only one of the recent settlements, the Yukon Umbrella Final Agreement, comes under this "alternative". In that agreement the only Aboriginal rights that are not surrendered are surface interests in the lands that are retained as Indian lands.[267] Thus, it would appear that the current policy allows for only a minimal divergence from the basic position of requiring a total surrender of all Aboriginal rights.

Scope of the benefits Aboriginal groups can negotiate

Federal policy sets out a number of areas where benefits can be negotiated, including lands (including offshore lands), wildlife harvesting rights, subsurface rights, natural resources revenue sharing, environmental management, local self-government and financial compensation.[268] Certain limitations on each of

these areas are especially noteworthy.

First, until the recent federal announcement on self-government,[269] these issues were based on delegated authority, not the inherent right, and were the subject of separate negotiations governed by the federal policy on community self-government negotiations. Under the comprehensive claims policy, issues of self-government will be contained in separate agreements and separate enacting legislation. They will not receive constitutional protection unless there is a general constitutional amendment to this effect.[270]

Second, natural resources revenue-sharing provisions will be subject to limitations, which might include an absolute dollar amount, the duration of the revenue-sharing provisions or a reduction of the percentage of royalties generated.[271] Thus, natural resources revenue-sharing arrangements are seen more correctly as a way of spreading cash compensation over a longer period of time, rather than securing a significant continuing source of revenue for Aboriginal claimants.

Third, on the issue of Aboriginal participation in managing lands and resources, the policy requires that any arrangements recognize the overriding powers of non-Aboriginal governments.[272] While numerous management boards and committees have been set up under the various comprehensive land claims agreements (see Appendix 4B), these bodies remain advisory, although some have found innovative ways to prevent their recommendations from being ignored. Nonetheless, non-Aboriginal governments retain full jurisdiction and final decision-making authority.

The lack of interim measures

One of the most significant weaknesses of comprehensive land claims policy is the lack of any provision for interim measures before submission of a comprehensive claim and during negotiations. Governments are free to create new third-party interests on the traditional lands of Aboriginal claimants right up until the moment a claims agreement is signed.

The continuation of activities such as logging, mining and hydroelectric development before and during negotiations has, as we have seen in this chapter, provoked confrontation with Aboriginal people. Virtually all the co-management regimes established to date, including the Barriere Lake Trilateral Agreement in Quebec and the Clayoquot Sound Agreement in British

Columbia, were created because of Aboriginal protest over resource development. It should not be necessary for Aboriginal people to mount blockades to obtain interim measures while their assertions of title are being dealt with.

## The incentive to negotiate

Developing parallel to federal claims policy is the underlying law of Aboriginal title. Continuing uncertainty about legal recognition of Aboriginal title and the rights that adhere to such a title, as well as the absence to date of any truly effective judicial remedy, give Aboriginal and government parties sufficient reason to enter into treaty negotiations. Yet this incentive is offset by the fact that the federal government continues to contemplate blanket extinguishment of Aboriginal title as a possible option.

In addition, Aboriginal parties asserting an unextinguished Aboriginal title often find themselves involved in a constitutional dispute. Their assertions are typically opposed, primarily by a province protecting its jurisdiction over lands and resources, and frequently by Canada as well. This was the situation in *Calder* and subsequently in *Delgamuukw*, both cases relating to the assertion of Aboriginal title in British Columbia. In other provinces, Aboriginal groups have found themselves subject to a further gloss on existing policy. In *Bear Island*, an Ontario case, the federal government communicated its position that there could be no subsisting Aboriginal title in treaty areas even if the Aboriginal party had not actually joined in the treaty.[273] This was the situation of the Lubicon Cree as well.[274] Moreover, as previously noted, Métis people are excluded from asserting Aboriginal title under the policy.

## The Coolican report and revisions to policy

There has been one searching examination of existing policy. The task force to review comprehensive claims policy, which released its findings in 1985 (commonly known as the Coolican report), noted a fundamental difference in the aims of the parties to an Aboriginal title claim:

> The federal government has sought to extinguish rights and to achieve a once-and-for-all settlement of historical claims. The aboriginal peoples, on the other hand, have sought to affirm the aboriginal rights and to guarantee their unique place in Canadian society for generations to come.[275]

The report recommended a policy and process that would

• be open to all Aboriginal peoples using and occupying traditional lands whose title has not been subject to a treaty or to explicit legislation;

• recognize and affirm Aboriginal rights;

• allow for variation based on historical, political, economic and cultural differences among Aboriginal peoples and their circumstances;

• focus on negotiated settlements;

• be fair and expeditious;

• encourage the participation of provincial and territorial governments;

• allow for the negotiation of Aboriginal self-government;

• enable Aboriginal peoples and government to share responsibility for the management of lands and resources and to share the benefits of their use;

• deal with third-party interests in an equitable manner;

• be monitored for fairness and progress by an authority independent of the parties; and

• provide for effective implementation of negotiated agreements.

Government responded to these recommendations the following year in a publication entitled *Comprehensive Land Claims Policy.*[276] To the disappointment of Aboriginal groups and others who supported the Coolican report, the federal response offered an alternative to extinguishment of rights that was more illusory than real: self-government negotiations, if they resulted in an agreement, would receive no constitutional protection or independent monitoring authority. By and large, this remains the federal position with respect to comprehensive claims.[277]

Existing claims settlements

There have been eight major settlements of Aboriginal title claims affecting huge segments of northern Canada, the last six of which were concluded under the federal comprehensive claims policy:

• The James Bay and Northern Quebec Agreement, 1975

• The Northeastern Quebec Agreement, 1978

• The Inuvialuit Final Agreement, 1984

• The Gwich'in Comprehensive Land Claim Agreement, 1992[278]

• The Nunavut Final Agreement, 1993

• The Sahtu Dene and Métis Comprehensive Land Claim Agreement, 1993

• The Yukon Umbrella Final Agreement, 1994, consisting of four final agreements signed with the Vuntut Gwich'in First Nation, the First Nation of Na-cho Ny'a'k Dun, the Teslin Tlingit Council, and the Champagne and Aishihik First Nations

• the Nisg_a'a agreement in principle, 1996.

The main provisions of these settlements are set out in Appendix 4A, along with the Quebec government's 1994 offer of settlement to the Atikamekw-Montagnais people, whose Aboriginal title claim covers a large area of north-central Quebec. This example is included for comparative purposes only, since the offer has been rejected by the claimants, although technical discussions continue. Similar claims are expected from the 10 Algonquin First Nation communities that border the Atikamekw to the west. The Algonquin community of Kitigan Zibi (River Desert), the easternmost of these 10 communities, formally submitted its comprehensive claim to the federal government in 1994. It is currently being assessed by the department of justice. In the province of Newfoundland and Labrador, the Innu and Inuit of Labrador have asserted title claims. As well, the British Columbia Treaty Commission is now undertaking the negotiation of nearly 50 claims in that province.

The majority of modern treaties relating to Aboriginal title have been reached in the territories, where Canada has exclusive jurisdiction over lands and resources. The two modern treaties concluded in a province are the 1975

James Bay and Northern Quebec Agreement and the related 1978 Northeastern Quebec Agreement from (see Appendix 4A) and the recent Nisg_a'a agreement in principle in British Columbia. In the first case, Quebec's desire to develop hydroelectric resources motivated its participation in the settlement. There have been problems with the implementation of that settlement and others.[279] The Commission therefore repeats, with emphasis, the Coolican recommendation that an appropriate policy, and indeed the treaties themselves, must include appropriate provisions for implementation. An independent monitoring authority would help to ensure that result.

The British Columbia Treaty Commission

In British Columbia the process for negotiating comprehensive claims settlements has been somewhat modified by the presence of the British Columbia Treaty Commission, created jointly by the First Nations Summit, Canada, and British Columbia in 1992.[280]

The establishment of an independent body to monitor the negotiation process was also a recommendation of the Coolican report, one intended to redress the massive imbalance of bargaining power between federal and provincial governments on one hand and Aboriginal parties on the other.[281]

In that regard, the method of appointment of the commissioners is certainly promising. Canada and British Columbia each nominate one commissioner and the First Nations Summit nominates two; the chief commissioner is nominated jointly by the parties. However, the commission remains purely facilitative. While the involvement in negotiations of an outside party is certainly a step in the right direction, its true effectiveness remains to be assessed. Continued arguments between Canada and British Columbia, for example, have contributed to a delay in the commission's operations. Moreover, the fact that a number of First Nation communities in British Columbia have refused to join the First Nations Summit means that the Aboriginal side is not fully representative.

We note particularly that federal negotiators do not have the authority to depart from existing comprehensive claims policy. Without significant policy changes, therefore, extinguishment of Aboriginal title will remain one of the criteria for any new treaties in British Columbia.

The 1995 fact finder's report on surrender and certainty

In December 1994, the minister of Indian affairs appointed Alvin C. Hamilton, a former associate chief justice of the Manitoba Court of Queen's Bench, as an independent fact finder to explore and report on existing federal claims policies and other potential models for achieving certainty of rights to lands and resources through land claims agreements. The appointment was made in response to a June 1994 report of the House of Commons standing committee on Aboriginal affairs that asked the minister to "consider the feasibility of not requiring blanket extinguishment". The fact finder's report, entitled *Canada and Aboriginal Peoples: A New Partnership*, was released in September 1995.

In his report, Mr. Hamilton explicitly rejected the current federal policy requiring extinguishment or surrender of some or all Aboriginal rights to lands and resources in exchange for rights and benefits set out in an agreement or modern treaty. He offers an alternative to eliminate the need for a surrender clause while achieving the necessary level of certainty. This alternative has six essential and interconnected elements:

1. recognition in the preamble that the Aboriginal party to the treaty has Aboriginal rights in the treaty area;

2. as much detail as possible concerning the rights to lands and resources of each of the parties to the treaty and of others affected by it;

3. mutual assurance clauses in which the treaty parties agree that they will abide by the treaty and exercise rights only as set out in the treaty;

4. mutual statements that the treaty satisfies the claims of all parties to the lands and resources covered by the treaty and that no future claims will be made with respect to those lands and resources except as they may arise under the treaty;

5. a dispute resolution process with broad powers, including binding arbitration and judicial review, to ensure that treaty obligations are met and disagreements about the treaty are addressed; and

6. a workable amendment process whereby the parties can, if they agree, amend certain provisions of the treaty to respond to changing circumstances.[282]

We are pleased to observe that the fact finder's recommendations are similar to

the alternative presented in our special report on extinguishment, *Treaty Making in the Spirit of Co-existence*, as well as to recommendations later in this chapter dealing with the content and scope of new or renewed treaties.

The fact finder was asked by the minister to consider our special report when conducting his deliberations. Mr. Hamilton did express some disagreement with our second recommendation, which he sees as endorsing partial extinguishment in certain circumstances. He does not believe that "there are any circumstances that warrant even a partial extinguishment or surrender of Aboriginal rights whether one is dealing with Aboriginal rights in general or more specific Aboriginal rights with respect to lands and resources".[283] In our view, his disagreement is one of degree more than of kind, particularly if our recommendation is read in light of our discussion in the special report:

Requiring partial extinguishment as a precondition of negotiations is also an inappropriate means of achieving co-existence. Partial extinguishment often results in the extinguishment of rights to far more territory than the term 'partial' perhaps implies. Because of its permanent effects, any decision to agree to partial extinguishment of Aboriginal title should be made after a careful and exhaustive analysis of alternative options. We do not wish to suggest in this report that an Aboriginal nation should never be entitled to exchange some of its territory for certain treaty-based benefits. Nor do we wish to foreclose the availability of bargaining solutions that rely in part on partial extinguishment techniques. Nevertheless, we hope that the approach we propose will prove more attractive in most instances.[284]

The Commission cannot support the extinguishment of Aboriginal rights, either blanket or partial. It seems to us completely incompatible with the relationship between Aboriginal peoples and the land. This relationship is fundamental to the Aboriginal world view and sense of identity; to abdicate the responsibilities associated with it would have deep spiritual and cultural implications. However, we recognize that there will be circumstances where the Aboriginal party to a treaty may agree to a partial extinguishment of rights in return for other advantages offered in treaty negotiations. We would urge, however, that this course of action be taken only after all other options have been considered carefully.

Mr. Hamilton had a number of useful suggestions to improve treaty documents. He was critical, for example, of the language of the recent Yukon Umbrella Final Agreement:

I attempted to read the *Umbrella Final Agreement, Council for Yukon Indians*. While I have some years of experience as a practising lawyer and as a judge, I must say that I found the document convoluted and very difficult to follow. I understood what a presenter meant when he said one would need to be a lawyer or a negotiator who has been involved in the negotiation of a treaty to be able to understand it.[285]

Mr. Hamilton's opinion, which we share, is that the language used in treaty documents should be clear, plain and understandable to everyone, not just to those involved in preparing the draft.

Mr. Hamilton also believes that the certainty desired by all parties can be provided by clearer, more concise treaties than those of recent years. Concerning land regimes, he suggests that the treaty simply state at the outset the nature of each type of land within the treaty area and then give a general outline of the rights of each party with respect to each category. This is an excellent suggestion. Our point of disagreement is that Mr. Hamilton proposes only two categories — settlement land (that portion owned by the Aboriginal party) and non-settlement land (the rest of the land within the treaty area that is owned by the government or is privately owned and to which the Aboriginal party has special rights). We envision instead a tripartite land scheme involving settlement land, shared land (land under joint jurisdiction and management by the Crown and Aboriginal parties) and non-settlement land. We believe this land regime would provide greater self-sufficiency for Aboriginal peoples than the bipartite scheme favoured by current claims policy.

We share Mr. Hamilton's view that the federal government's present approach to the treaty process is inappropriate. We also agree with his comments on the lack of government response to the many criticisms of claims policy made over the years.

### *The specific claims process*

As defined by government and set out in the 1982 publication, *Outstanding Business*, a specific claim is one based upon a "lawful obligation" of Canada to Indians. Claims based on unextinguished Aboriginal title are expressly excluded, as were pre-Confederation claims until 1991.[286] A specific claim, from the government's point of view, is little more than a claim for compensation.

Although the term ‘specific claim’ was derived from earlier departmental policy discussions and the 1969 white paper, which stated that Canada would continue to honour its “lawful obligations” in respect of claims “capable of specific relief”, the concept of lawful obligation remains at the centre of specific claims policy, although there is no agreement upon what facts or relationships might constitute such an obligation. In a paper prepared for the department of Indian affairs before publication of the policy, G.V. La Forest suggested that “we are not so much concerned with a *legal obligation* in the sense of enforceable in the courts as with a *government obligation of fair treatment* if a lawful obligation is established to its satisfaction”. [emphasis added][287] He made a distinction between claims that might be enforceable in the courts, under court procedures, and obligations that could be upheld under a lower administrative standard. The department of justice, however, assesses the validity of claims in terms of their chances of success in court and applies technical rules of evidence.[288] Thus, legal validity informs the government’s assessment of whether a claim properly falls within the scope of federal policy. This assessment is further informed, if not defined, by the examples of lawful obligations set out in the policy itself:

A lawful obligation may arise in any of the following circumstances:

1. The non-fulfilment of a treaty or agreement between Indians and the Crown.

2. A breach of an obligation arising out of the *Indian Act* or other statutes pertaining to Indians and the regulations thereunder.

3. A breach of an obligation arising out of government administration of Indian funds or other assets.

4. An illegal disposition of Indian land.[289]

The more restrictive view of lawful obligation is that a claim must fall within one of these examples in order to come within the policy. The most restrictive view is that a claim must fall within one of the examples and also within the compensation guidelines; that is, compensation in the form of money or land must be possible.[290]

A narrow and restrictive reading of the policy leads to the exclusion of many claims based on non-fulfilment of treaty obligations. Assertions of the right to

exercise hunting and fishing rights, for example, or of rights to education, health and other benefits, are not seen by government as coming within the policy even though they are justiciable rights. Even seemingly uncontroversial obligations, such as the provision of land under the terms of treaties, have been subject to the same narrow reading. This was the 1983 conclusion of a commission appointed by the Manitoba government to make recommendations about treaty land entitlement:

One may be compelled to conclude that the Office of Native Claims' interpretation of Canada's 'lawful obligation' is unfair and unreasonable ... .The Office of Native Claims, by its words and conduct, is acting actively against the interests of the Indians to arrive at a mutually acceptable agreement. The Office of Native Claims is acting inconsistent with the Canadian Government policy and the expressed position of its present Minister and the Ministers who preceded ... .This is a harsh comment, but the facts presented to this Commission do not permit any other conclusion.[291]

It is the great irony of the policy, and the most common complaint against it, that it was intended to broaden the concept of negotiable claims beyond those that might be proven strictly in court. In fact, it does precisely the opposite. Nowhere is this more evident than in the failure to incorporate, as a basis of claim, breach of fiduciary obligation, which was established as actionable in 1984 by the Supreme Court of Canada.[292]

In addition, the government's determination of validity involves a clear conflict of interest. The department of justice faces a conundrum, because the policy directs it to ignore technical rules of evidence and the issue of justiciability. Yet how can it advise government that a treaty includes one set of terms, with one meaning for purposes of claims policy, but another set of terms, with a different meaning, for purposes of litigation? It is not clear how these conflicting demands can ever be reconciled in the absence of significant institutional reform, but it is not at all difficult to identify the ensuing tensions and inconsistencies.

As a result, the department of justice advises on treaties in the same way that it litigates them. In many ways, stances taken by the department in litigation portray treaties as contracts and downplay the fact that they reflect and are the product of a fiduciary relationship between the Aboriginal nation and the Crown. At issue in a fiduciary relationship is conduct, not contract. The law of fiduciary obligations holds the Crown to its substantive promises, regardless of the language used in formal agreements.[293] As Justice Wilson wrote in the *Guerin*

decision, “Equity will not permit the Crown to hide behind the language of its own document”.[294]

The policy interpretations and practices noted here create the perception, if not the reality, of a policy that is arbitrary, self-serving and operating without due regard to established law. If negotiated settlements are meant to be achieved according to a broader range of rights and obligations than those otherwise enforceable in a court of law, then federal policy must set a clear standard by which their validity can be determined. If the department of justice cannot advise on such a standard in a manner consistent with its other responsibilities to the Crown, then the advice must come from elsewhere. At a minimum, Canada cannot continue to articulate standards that exclude justiciable claims from its policy for negotiated settlements.

The specific claims policy also contains restrictions on compensation, in the form of guidelines, which ensure much delay and confrontation in negotiations. The policy’s first rule is that compensation will be based on “legal principles”, but nine other guidelines qualify it. Of particular concern is guideline number 10:

The criteria set out above are general in nature and the actual amount which the claimant is offered will depend on the extent to which the claimant has established a valid claim, the burden of which rests with the claimant. As an example, where there is doubt that the lands in question were ever reserve land, the degree of doubt will be reflected in the compensation offered.[295]

In practice, guideline number 10 means that the federal government may, at any stage, reduce the amount of compensation being offered by 25 per cent, 50 per cent or 75 per cent. The perception is widespread that such determinations are made arbitrarily, or with a view to the budget rather than the facts. In many cases, contract not conduct has determined the degree of doubt, leaving the Aboriginal party wondering whether it still has a valid claim.

More generally, the compensation guidelines do not reflect the reality of claims negotiation. When the federal government determines that it wishes to settle a specific claim, it offers a lump sum payment unrelated to the compensation criteria and settles without further reference to them. Years can be wasted negotiating on the guidelines, only to have the government abandon them in a final offer. Such guidelines are, in our view, unnecessary and provocative.

Of an estimated 600 specific claims in Canada as a whole, approximately 100

have been settled under the specific claims policy. As is often the case, however, these statistics do not reveal the full story. Most of the specific claims settlements have been made during the past five or six years, when increased funding has been available.[296] The majority of claims had been in the process for as many as 15 years or more. For example, a recent settlement with the Nipissing First Nation community in Ontario resolved a claim that had first been submitted in 1973. There are also regional variations that further skew the numbers due to 'batch' settlements like those relating to cut-off lands in British Columbia or treaty land entitlement in Saskatchewan. As noted by the Indian Commission of Ontario, about one settlement a year is made in central and eastern Canada; several hundred claims remain to be dealt with across the country.

Government and the public may take some satisfaction in the number of settlements that have been achieved, frequently despite the obstacles created by federal specific claims policy. However, a study of 17 settlements, prepared for the department of Indian affairs in 1994, disclosed that only two of those communities were satisfied with the result.[297] The others felt that the claims process had diverted them from the original grievance in favour of financial compensation. Where, for example, the communities wanted reserve land in return for loss of territory, they received cash. This continuing sense of grievance calls into question whether current federal policy can ever lead to durable settlements.

Where a specific claim is based on the misappropriation or loss of trust funds, financial compensation is clearly appropriate. But where the claim is for loss of land, provision for land must be a major component of the settlement. For a number of reasons discussed later in this chapter, Commissioners believe that the transfer of Crown land (or private land, where there is a willing seller) is both less costly and more effective than cash payments for resolving specific claims. A recent review of Indian land claims policy in the United States, for example, has shown that those who benefit from cash settlements are most often lawyers and the economies of surrounding non-Aboriginal communities.[298]

Federal policy is not solely to blame, however, for the failure to include land in claims settlements. Because of the existing division of constitutional powers, any transfer of Crown lands or resources necessarily involves negotiations with the provinces. In some instances, either the federal government has not invited provinces to take part in negotiations, or provinces have refused to put any land on the table. In cases where Aboriginal territory has become provincial Crown

land as the result of a breach of Crown duty, provincial governments must make Crown land available to an Aboriginal nation as a replacement. In our view, the provision of land in such circumstances is not only just, it is a matter of fiduciary obligation.

The 1994 study noted other perceptions about the federal specific claims policy and process that have been advanced consistently on behalf of Aboriginal groups over the years:

• Government is seen as having a conflict of interest (acting as both judge and jury).

• The policies incorporate restrictive criteria that lead to confrontation and inhibit flexible and creative solutions.

• The process is too time-consuming and too confrontational.

• It is not directed at ameliorating the original grievance.

• Government negotiates on a 'take it or leave it' basis.

• Settlements do not have a long-lasting or positive effect on communities.[299]

Notably, the study disclosed that both government and Aboriginal parties saw claims negotiation as a "trying" process that did not work for them. The truth of these observations is sadly borne out by the confrontation at Ipperwash in the fall of 1995. A cash payment to the Kettle and Stoney Point First Nation in 1992, as compensation for the 1942 military expropriation of the Stoney Point Reserve, did little to resolve the underlying grievance, which was the federal government's failure to return the expropriated lands in a timely fashion. Even with the return of the land, we believe that the federal government should give serious consideration to reinstating the Stoney Point community.

While it is possible to reach a negotiated claims settlement within the policies, it is far from clear that these settlements will deal ultimately with the underlying causes of grievance or implement any significant change over the long term. The Commission believes the number of settlements does not vindicate the specific claims policy or rebut the criticisms levelled against it. Our review of the specific claims policy and process shows that major change is needed.

### *Claims of a third kind*

Claims of a third kind, acknowledged since 1993, are really a subset of specific claims. Such claims are intended to attract “administrative solutions or remedies to grievances that are not suitable for resolution, or cannot be resolved, through the Specific Claims process”. The policy provides no definition of what kinds of claims might fall into this category. The only example given is the Kanesatake claim, which has lingered in this category without resolution for the past five years. Many other claims previously rejected by the departments of Indian affairs and justice because of their failure to fit within existing claims policy, such as those of the Mi’kmaq Nation and the Lubicon Cree, have not yet been considered as candidates for this category.

If the Kanesatake claim is an appropriate example, then such claims can be negotiated, but no indication is given of the purpose of negotiation or the potential results. Quite simply, the problem with claims of a third kind is that there is no purpose, no definition, no process, no conclusion and no review.

An appropriate claims process would not require an unarticulated catch-all category like claims of a third kind. Such a policy would include these claims as part of the overall objective of achieving reconciliation and coexistence.

## 5.3 Specific Claims Initiatives: 1990-1995

In the fall of 1990, prompted by that summer’s events at Kanesatake, government took several steps in relation to specific claims: the budget for claims settlements was increased, a ‘fast-track’ process was implemented for claims of relatively small value, and the bar on claims originating before 1867 was to be removed. Also an independent review body was promised in tandem with an overall review of claims policies.[300]

The chiefs’ committee on claims was formed as an ad hoc group of interested parties to advise on the policy review. Co-chaired by Chief Manny Jules of Kamloops and Harry LaForme, then Indian commissioner of Ontario, and with the administrative support of the Assembly of First Nations (AFN), the committee produced a position paper on claims that was forwarded to the minister of Indian affairs in December 1990.[301]

As a result of subsequent discussions, it was agreed in 1991 that government would enter into a policy review protocol with a joint government-AFN working

group on claims policy. At the same time, and as an interim measure while this policy review was under way, the federal government undertook to establish an Indian specific claims commission.

### *Indian Claims Commission*

The Indian Specific Claims Commission was established in July 1991 and came to be known as the Indian Claims Commission. It had powers under the *Inquiries Act* to review certain ministerial decisions under the specific claims policy and advise government about them. There was, however, an immediate dispute between AFN and government over the wording of the order in council creating the commission, which was seen as tying it too closely to the policy to make recommendations of any value. This dispute simmered for nearly a year until a revised mandate was issued in July 1992 and a full complement of commissioners was appointed.[302]

Under its revised mandate, the commission is directed to inquire into and report upon the following ministerial decisions under the specific claims policy:

1. whether a claimant has a valid claim for negotiation under the policy where that claim has already been rejected by the minister; and

2. which compensation criteria apply in negotiation of a settlement, where a claimant disagrees with the minister's determination of the applicable criteria.

The commission is also authorized to provide mediation services for specific claims issues at the parties' request.

By March 1995, the Indian Claims Commission had filed seven reports with the parties to particular claims. The reception to these reports has been mixed, especially in government. The commission has had some success with its mediation efforts, despite the federal government's earlier refusal to participate in mediation. To date, it seems too closely linked to the existing specific claims policy to work effectively, and the entire process needs to be improved. In 1994, the commission expressed frustration at the time lag in government response to its reports and envisioned a role of facilitating claims through alternative dispute resolution techniques. It suggested that claims might be submitted to the commission before going to the departments of Indian affairs and justice.[303]

In its early reports, the commission has not addressed difficult issues of law, although legal issues are crucial to a policy ostensibly based on lawful obligation. Such issues cannot be avoided if the commission, or some version of it, is to have the power to make binding decisions. There are lessons to be learned from its experience. Since the commission is only in a position to make recommendations, it has favoured the role of an informed but objective entity that can help the parties refrain from becoming too adversarial. A different balance must be struck if an effective, independent tribunal is to be established.

Recently, the Indian Claims Commission published a special volume of its proceedings intended to serve as a discussion document for land claims reform. It suggests that where it sees broad consensus, the following steps should be taken immediately:

• create an independent claims body (ICB);

• validate claims by some other body (such as ICB) to remove the conflict of interest that exists for the federal government in the present system;

• facilitate claims negotiations by ICB (or some other body) to ensure fairness in the process; and

• recognize the need for ICB (or some other body) to possess the authority to break impasses in negotiations regarding compensation.[304]

We support these measures, as far as they go, and see them as consistent with the recommendations later in this chapter.

### *The joint government/First Nations working group on claims policy*

The second initiative was a joint working group to conduct an overall review of claims policy. This group did not finalize its operating mandate until the spring of 1992. Unfortunately, that mandate required consensus among government and First Nations representatives on major recommendations, and that consensus proved elusive. A mediation expert retained by the joint working group produced a neutral draft, signalling points of agreement and disagreement, shortly before the group's mandate expired in July 1993.[305] It wound down without achieving its purpose or even agreement on what constitutes a claim. We have incorporated some elements of the neutral draft in the interim specific claims protocol recommended later in this chapter.

### *The AFN chiefs' committee on claims*

The chiefs' committee continues, although a lack of funding has prevented it from undertaking any major work. In August 1994, the committee produced a summary report on the reform of federal land claims policies. It pointed to 32 concerns about the current policies and recommended the following:

• an independent body, involved in facilitating claims throughout the entire process, from the research, development and submission of claims, through negotiations and on to the implementation of settlements;

• a fair and equitable process with the power to bind government;

• an appeal mechanism; and

• independent funding.

The chiefs' committee also emphasized the importance of linking claims and treaties in an appropriate manner. There has been no formal response from government to this report.

### *Public awareness*

Canadians generally expect that Aboriginal claims will be resolved fairly and expeditiously. Public expectations are easily identified. There is a general desire that government discharge this task at minimal cost and without serious disruption to the established order of things. Specifically, Canadians do not want the resolution of Aboriginal claims to intrude upon private rights or private claims on public resources. They do not seem inclined to explore the dilemma this creates when constitutional rights and government's historical fiduciary obligations to Aboriginal peoples are at stake.

The fact remains that most Canadians are generally aware of and to some degree intimidated by Aboriginal claims but have little knowledge of the facts or circumstances of these claims. While aware of settlements as they are concluded and announced, people are not aware of the investment of time, energy and money or the many delays and frustrations involved in achieving those settlements.

Our review of these issues makes it clear that major change in federal claims

policies is long overdue. This is an urgent issue. We note that before the 1993 federal election, the Liberal Party of Canada announced its intention to overhaul claims policy and expressed a commitment to an independent process and a tribunal.[306] To date, the government has taken no action to implement those commitments.

We believe a major reason for the delay is the central role played by the department of Indian affairs in the development and implementation of federal policy on Aboriginal issues. As we will see, the department's role generally has been more harmful than helpful.

## 5.4 The Institutional Interests of the Federal Government

In 1994, the Indian Claims Commission criticized the department of Indian affairs for its consistent failure to produce documents quickly, attend meetings, consider mediation and respond to the commission's recommendations in a timely manner.[307] Although intended to help speed the resolution of claims, in practice the commission has been unable to exercise this part of its mandate because the department appears to treat its operations as an interference with the normal workings of claims policy. Such behaviour is symptomatic of the department's adversarial attitude toward First Nations.

This is far from a new phenomenon. The late George Manuel experienced it when serving as co-chair of the National Indian Advisory Council, appointed by the Pearson government in 1964:

[The] National Indian Advisory Council ... was to be the first time that Indian people would actually participate in an official inquiry into Indian matters. There was finally to be a distinction made within government between the way Indian Affairs related to Indian people and the way Transport related to trains, planes and ships ... .

[T]he Indian affairs people who sat with us in those conferences tended to blame the [Indian] Act itself for the lack of development on reserves and for the control it held over Indian lives. The Indian consensus went very much the other way ... .There was a common belief among us that the primary problems lay with Indian Affairs, and the relations the bureaucracy maintained with our people. None of that is prescribed in the Act. The source of the problem lies mostly in the attitude that no legislation can change so long as the present staff continues in the traditional structure, so long as the traditional structure of civil

service roles is passed on from one generation to another, like an hereditary title, and the relationship between bureaucrat and Indian never becomes a relationship between man and man.

There was never a point in all those discussions when the Indian delegates recommended that the Indian Act be repealed.[308]

All institutions, if they are in existence long enough, develop a corporate memory. Policies may change over time, but as Manuel pointed out, practices — the mix of training and inherited ways of doing things that govern how employees work — do not change nearly so quickly. Government institutions are not simply neutral bodies carrying out policies in a balanced fashion on behalf of the public; they have interests of their own. We have seen how lands and resources management agencies have tended to limit Aboriginal participation. The observation is even more applicable to the department of Indian affairs, which can claim legitimately to be the oldest federal department, tracing its origins to Sir William Johnson's northern Indian superintendency in the 1750s. But the department's real corporate memory dates from the century after Confederation, when it held virtually total sway over the lives of Aboriginal people.

Government employees are also members of the general public. As we learned during our hearings, many people have deeply held beliefs about property rights and resources that often conflict with those of Aboriginal people. At least some of this conflict stems from the negative ways Canadians have been conditioned to see Aboriginal people, particularly during the past century. These conditioning factors need to be understood if there is ever to be a new relationship.

### *Assimilation policies*

In a speech to the House of Commons in 1950, the minister responsible for Indian affairs, Walter Harris, summarized the long-time aims of Indian affairs policy:

The underlying principles of Indian legislation through the years have been protection and advancement of the Indian population. In the earlier period the main emphasis was on protection. But as the Indians become more self-reliant and capable of successfully adapting themselves to modern conditions, more emphasis is being laid on greater participation and responsibility by Indians in the conduct of their own affairs. Indeed, it may be said that ever since

Confederation the underlying purpose of Indian administration has been to prepare the Indians for full citizenship with the same rights and responsibilities as enjoyed and accepted by other members of the community ... .

The ultimate goal of our Indian policy is the integration of the Indians into the general life and economy of the country. It is recognized, however, that during a temporary transition period of varying length, depending upon the circumstances and stage of development of different bands, special treatment and legislation are necessary.[309]

These goals would remain basically unchanged — though constantly challenged — until the 1969 white paper on Indian policy.[310] The policy of assimilation had its roots in the nineteenth century, when governments in Canada and the United States — motivated by both philanthropic ideals and notions of European cultural and racial superiority — tried, through civilization and enfranchisement legislation, to eliminate distinct Indian status and to blend Indian lands into the general system. Thus, imprinted on the corporate memory of the Indian affairs department well into this century was the attitude that Indian people required protection because they were inferior — although with proper education and religious instruction, they could be turned into productive members of society.

Such views became deeply rooted in Canadian society as a whole. As the Penner committee on Indian self-government observed in its 1983 report to Parliament, it is only since the mid-1970s that public perceptions about Aboriginal problems have started to shift.[311] Even today, many Canadians subscribe to the goals elaborated by Walter Harris; they do not understand why one sector of Canadian society should have treaties with another. They continue to believe that the solution to land claims and other issues lies in Aboriginal peoples' integration and assimilation into mainstream society.[312] Such views are being rejected explicitly, however, in emerging international legal principles, and assimilation policies have been criticized by major religious institutions.[313]

Most Canadians are unaware that Indian people refused all along to accept assimilation (or enfranchisement, to use the words of the *Indian Act*). Between 1857 and 1940, fewer than 500 people chose voluntarily — even under intense pressure from the department — to give up their Indian status in exchange for social and political rights. Unfortunately, this determined adherence to religion, language and customs, including traditional land-use practices, only reinforced

the prevailing impression of Indian inferiority. To the department, it meant simply that Indian people would require the guiding hand of government — and a controlled reserve land base — for that much longer.

### *Federal policy on Aboriginal lands and resources*

The federal assimilation policy also explains, at least in part, the extraordinary pressures placed on Indian nations over the past century to surrender or sell their reserve lands and resources. If reserves were simply a temporary expedient — a way station en route to assimilation — then there was no particular reason to treat their natural assets with respect. At the same time, the departmental focus on reserves, even in a negative sense, had profound consequences for all Aboriginal peoples. First Nations have had every aspect of daily life regulated while Métis people and non-status Indians have been neglected completely.

The department of Indian affairs has continuously downplayed the Crown's obligations under the historical treaties. Faced with provincial and territorial policies, which have limited Aboriginal access to lands and resources off-reserve, Indian affairs officials — particularly those at the highest levels — generally did not champion Aboriginal people, as when they failed to defend harvesting rights explicitly spelled out in treaties.

This aspect of the department's behaviour also had links to the policy of assimilation. Most galling to federal officials were the many individuals who learned English or French, became Christians, found jobs in the mainstream economy, and still refused to surrender their identity. At least in Ottawa, department personnel were unfamiliar with the kinship ties and customary laws that characterized traditional harvesting, and this easily led to the conclusion that, if someone had secured employment, he or she was no longer Indian. Provincial and territorial wildlife officials also subscribed to this view, and it continues to be held by some Canadians.

In and of itself, as we have seen throughout this chapter, the department's behaviour has contributed greatly to the backlog of Aboriginal grievances. From Confederation until the early 1960s, Indian affairs officials refused to take land claims seriously and tried to prevent Aboriginal people from bringing them to the attention of Parliament and the public. Even today, despite the exponential growth over the past 20 years of policies and programs to deal with land claims and claims-related issues, the tradition that Indian people do not have land or resource rights outside their reserves is a strong component of the corporate

memory of the department of Indian affairs. It is reflected in the department's preference for extinguishment as a valid option in comprehensive claims settlements.[314] It is reinforced by interpretations of Aboriginal and treaty rights that continue to be advanced by lawyers working in the departments of justice and Indian affairs. And it is reflected in the way the department classifies claims — downgrading matters of treaty interpretation and consistently limiting the discussion of Aboriginal grievances to matters connected with the past treatment of reserve lands and assets.

Adversarial attitudes are hindering the creation of policy measures that can genuinely fulfil the federal government's fiduciary duty to Aboriginal peoples. In his report on extinguishment, for example, A.C. Hamilton expresses dissatisfaction with a background paper prepared for his inquiry by officials of the departments of Indian affairs and justice. That paper outlined the present requirements of federal comprehensive claims policy and put forward seven alternative models for discussion.[315] Mr. Hamilton found the paper, and all but two of the models, distinctly unhelpful. He characterized the fears expressed in the paper about the continuation of "undefined Aboriginal rights" as a defence of existing policy:

The statement appears to reflect the extent to which current departmental thinking is influenced by the existing policy, even though the paper purports to advance alternatives to it. I believe this statement represents a belief by some departmental officials that the present policy and its wordings are quite appropriate and are merely misunderstood. If so, that attitude fails to appreciate the strength of the Aboriginal opposition to giving up, surrendering or exchanging Aboriginal rights, even for the limited purpose the present practice requires.[316]

We, too, have been struck by the resistance of the department of Indian affairs in maintaining its claims policies and practices in the face of cogent and well-documented criticism over a period of nearly two decades. We have noted, however, that without formal changes in these policies, the department has created a large number of exceptions and has dealt with similar matters in inconsistent ways. Many justiciable rights have been excluded, as have some Aboriginal groups. For substantive change to occur, we have recommended that the department of Indian affairs be disbanded and replaced by two new departments (see Chapter 3).

## 5.5 Conclusion: The Need for Structural Change

Since the early 1970s, a virtual claims industry has developed; federal claims policies continue to perpetuate procedures that are dilatory, adversarial and unsatisfactory to all concerned. Claims negotiations have managed to take on a life of their own, leading to settlements that do not address the original grievance or vindicate the original assertions. Federal policies have consistently ignored what should be the fundamental goal of a just settlement of Aboriginal claims, a goal expressed by Indian claims commissioner Lloyd Barber in 1973:

In the final analysis it must be realized that the process of ... claims settlement involves not just the resolution of a simple contractual dispute, but rather the very lives and being of the people involved. Desire for settlement does not concern only the righting of past wrongs but as well the establishment of a reasonable basis for the future of a people ... .After all, much of our current difficulty stems from the rigidity and inflexibility of positions established ages ago.[317]

The current situation cannot endure. Fundamental change is urgent. But change requires mutual respect and reconciliation between Aboriginal peoples and other Canadians, not a return to failed policies of assimilation based on the surrender or extinguishment of Aboriginal title. In the next section, we develop the outline of a new deal for Aboriginal nations, one that will structure all claims issues within the context of the treaty relationship. Our proposal also includes the creation of a federal tribunal, one that would assist treaty processes and have binding decision-making powers over an enlarged category of specific claims. That such a tribunal was first proposed well over 30 years ago is in itself sad testimony to the continuing need for change.

# 6. A New Deal for Aboriginal Nations

## 6.1 Redressing the Consequences of Territorial Dispossession

As we learned from the song of Dene Th'a prophet Nógha, land is at the core of Aboriginal identity, a source of profound spiritual and moral values. Dene Th'a and other Aboriginal peoples require greater physical space than non-Aboriginal people to maintain their cultures and to protect their quiet and symbolic places — places of autonomy where they can reassert authority over their economic, social and political futures. For the same reason, Aboriginal

peoples also require a greater share in decision making about activities occurring on the parts of their traditional territories currently treated as ordinary Crown land.

A rapidly growing population is straining the resources of reserves and Aboriginal communities. In almost all cases, reserves are too small even to support existing numbers. In addition, most Aboriginal peoples in Canada have neither effective control over their existing lands nor sufficient access to lands and resources outside their reserves or communities.

Aboriginal peoples have tried for more than a century to maintain their own land base and derive a decent living from the natural resources and revenues of their traditional territories but these aspirations have been frustrated. Reserves and community lands have shrunk drastically in size over the past century and have been stripped of their most valuable resources. Moreover, as governments allocated resources and economic opportunities on traditional territories, Aboriginal peoples found themselves either excluded or positioned at the back of the line.

It is not difficult to identify the solution. Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a greater share of the lands and resources in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently on the margins of Canadian society, they will be pushed to the edge of economic, cultural and political extinction. The government must act forcefully, generously and swiftly to assure the economic, cultural and political survival of Aboriginal nations.

This is as true for nations that have yet to enter into treaty with the Crown as it is for those that are party to historical treaties. There must be a presumption that Aboriginal signatories did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by agreeing to a treaty relationship. Where the text of an historical treaty makes reference to a blanket or wholesale cession of lands, the treaty relationship mandates sharing of both the territory and the right to govern and manage it, as opposed to a cession of the territory to the Crown.

Despite difficulties with current claims policies, especially the continuing requirement for some form of extinguishment of Aboriginal title, the

Commission does not want to suggest that the consequences of these policies have been uniformly negative. Recent agreements are proof that more territory and jurisdictional authority will have a dramatic effect on Aboriginal nations' ability to achieve economic, cultural and political self-sufficiency. In Appendix 4A, we outline the land provisions of the modern treaties and comprehensive agreements and, in Appendix 4B, the provisions of land and environment regimes established under these agreements. For Inuvialuit of the western Arctic, for example, fee simple or community lands amount to about 30 per cent of territory covered by the land claims settlement. In addition, Inuvialuit have achieved a share in the management of resources on Crown lands throughout the entire settlement region. Other recent agreements in the North have similar provisions. As a result of the Yukon final agreement, the First Nations there will have an expanded base of exclusive Aboriginal lands (in their case, some eight per cent of the settlement area) and a share in the management of additional lands and resources.[318] Through their agreement, Inuit of the eastern Arctic will have both extensive community lands and access to resources. Through the new government of Nunavut, they will also have significant authority over all Crown lands and resources.

Inuit of northern Quebec have an agreement with Quebec and Canada; the neighbouring Inuit of Labrador do not. While there have been complaints relating to the implementation of the James Bay and Northern Quebec Agreement,[319] there can be no question that Quebec Inuit are more self-sufficient than their neighbours. Labrador Inuit have no formally recognized lands of their own, no guaranteed rights to resources outside their communities and no share in the governance of their traditional land-use areas.

The same conclusion can be drawn if we compare the Crees of eastern James Bay, who signed the 1975 James Bay and Northern Quebec Agreement, with the Cree of western James Bay in Ontario, who took part in Treaty 9.[320] By any measurable standard, the eastern Crees are in a better situation, with more economic tools at their disposal to improve the lot of their communities. They have more land, more rights to resources and more capital than their neighbours (although they have continuing disputes with the government of Quebec about resources development and the respective powers of the parties on the various land categories described in their agreement.) Ontario does not acknowledge that the western Cree have rights to Crown land outside their reserves other than limited hunting, fishing and trapping rights. Inhabitants of Peawanuck (Winisk) on the western James Bay coast, which is located within a provincial park, require a work permit from an Ontario ministry of natural resources office several hundred kilometres away if they want to cut down trees

to build a trapper's cabin on their traditional lands.[321] Through their agreement, the eastern Crees negotiated an income security program for traditional harvesters that is the envy of harvesters throughout northern Canada.[322] The Mushkegowuk Tribal Council, which represents First Nations on western James Bay, has tried to negotiate a similar program for its member communities, thus far without success.

The problem and the solution are easy to identify, but providing Aboriginal nations with enough territory to facilitate economic, cultural and political self-sufficiency will be difficult. Nonetheless, the Commission believes that the law of Aboriginal title provides guidance. After more than a century of relative legal inaction on the rights of Aboriginal peoples to lands and resources, the law is finally beginning to recognize that they have a strong moral case for redress; they also have enforceable rights to an expanded base of lands and resources and to a share in jurisdiction over traditional territories that now fall within the category of Crown or public lands. The law of Aboriginal title, outlined in the next section, imposes extensive obligations on the Crown to protect Aboriginal lands and resources.

However, courts alone cannot provide everything required to achieve economic and cultural self-reliance and political autonomy. We propose that Parliament and the provinces introduce a range of reforms to facilitate negotiated solutions concerning the recognition and protection of Aboriginal rights to lands and resources. We also propose the establishment of an Aboriginal Lands and Treaties Tribunal to assist in redressing the consequences of territorial dispossession. As well, we propose a number of interim measures to protect Aboriginal title pending introduction of these institutional reforms and to improve Aboriginal access to lands and resources.

## 6.2 The Contemporary Law of Aboriginal Title as a Basis for Action

Aboriginal peoples' experience with the law of Aboriginal title has been one of promise and frustration. The law of Aboriginal rights, including rights associated with Aboriginal title, provides a bridge between Aboriginal nations and the broader Canadian community. It draws on the practices and conceptions of all parties to the relationship, as these were modified and adapted in the course of contact (see Chapter 3). Canadian law recognizes and affirms Aboriginal relationships with the land and its resources. Indeed, recognition of Aboriginal title fundamentally structured the relationship between Aboriginal and non-

Aboriginal people during much of the history of non-Aboriginal settlement and colonization of eastern and central North America. Recognition formed the basis of a pattern of contact that held real value for Aboriginal and non-Aboriginal people alike. Beginning in the second half of the nineteenth century, however, Aboriginal peoples encountered more and more difficulty securing recognition of their rights, despite persistent efforts.

The courts have begun to develop the law of Aboriginal title along its original path of respect and coexistence. In a landmark 1973 decision, the Supreme Court of Canada affirmed that Canadian law recognizes Aboriginal title as encompassing a range of rights of enjoyment and use of ancestral land that stem not from any legal enactment, such as the Royal Proclamation, but from the fact of Aboriginal occupancy.[323] The court has also held that the Crown owes a fiduciary duty to Aboriginal peoples in its dealings with Aboriginal lands and resources.[324]

In another case, the court ruled that treaties between the Crown and Aboriginal nations ought to be construed in light of their historical character, "not according to the technical meaning of [their] words but in the sense that they would naturally be understood by the Indians".[325] In 1990, in light of constitutional recognition and affirmation of existing Aboriginal and treaty rights by section 35(1) of the *Constitution Act, 1982*, the court ruled that "[t]he relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship".[326]

Courts have been careful to acknowledge that "[c]laims to aboriginal title are woven with history, legend, politics and moral obligations".[327] They emphasize the unique nature of Aboriginal title and tend not to subsume it under traditional common or civil law categories, referring to Aboriginal title as protecting an "Indian interest in land [that] is truly *sui generis*".[328]

With respect to claims of Aboriginal title to unceded ancestral lands advanced in the courts, claimants typically are required to prove that they and their ancestors have been members of an organized society that has occupied the territory in question since the assertion of British sovereignty.[329] Earlier intimations that some Aboriginal peoples were "so low in the scale of social organization" as to warrant no recognition of their title have since been roundly rejected by the judiciary as disreputable and discriminatory.[330]

With respect to claims of Aboriginal rights to engage in particular practices and activities associated with lands and resources, the courts have noted that such rights are collective and protect integral aspects of Aboriginal identity.[331] Like the communities in which they are exercised, Aboriginal rights are not frozen in time, but instead evolve with the changing needs, customs and lifestyles of Aboriginal peoples.[332]

The law of Aboriginal title thus acknowledges that societies and cultures evolve and transform over time and that legal recognition of Aboriginal rights is premised on continuity, not conformity, with the past. Given the dramatic transformations that accompanied contact, settlement and colonization, this acknowledgement is especially critical if the law of Aboriginal title is to reflect respect for Aboriginal relationships with lands and resources. In response to a host of complex factors, including historical patterns of non-Aboriginal settlement, economic development, intercolonial conflict and the intermingling of cultures, new Aboriginal collectivities, such as the Métis Nation, have emerged in North America. They have incorporated aspects of non-Aboriginal life into their cultures to produce unique new forms of Aboriginal identity, but they are self-governing, distinct societies that retain powerful relations with the land based on principles of stewardship and responsibility.[333]

This judicial reawakening holds real promise for the future. In particular, the law of Aboriginal title provides a strong foundation for contemporary protection of Aboriginal lands and resources. The law recognizes that Aboriginal peoples have collective rights to occupy and use ancestral lands “according to their own discretion,”[334] and it protects practices — traditional and modern — that are integral to Aboriginal identity.[335] The law also seeks to restrict non-Aboriginal settlement on Aboriginal territory until a treaty has been reached with the Crown.[336] As well, it imposes strict fiduciary obligations on the Crown with respect to Aboriginal lands and resources.[337]

These ways of regulating relations between Aboriginal and non-Aboriginal people have existed since contact but have begun to be reconstructed by the courts only recently, after years of neglect. Constitutional recognition and affirmation of existing Aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982* have provided additional support in reconstructing rights associated with Aboriginal lands and resources. In the words of the Supreme Court, “By giving aboriginal rights constitutional status and priority, Parliament and the Provinces have sanctioned challenges to social and economic policy objectives embodied in legislation to the extent that aboriginal rights are

affected”.[338]

Although true to the original purposes of the law of Aboriginal title, current jurisprudence cannot and does not accomplish all that is required to protect Aboriginal lands and resources. When an Aboriginal community asserts a particular right associated with its title to engage in a relatively discrete course of action, such as fishing, a ruling that defines the respective rights of the parties might be an effective means of resolving the issue. However, when an Aboriginal nation asserts a wide range of rights with respect to lands and resources associated with its title, the courtroom is not always the most effective forum to settle the dispute. Available remedies are often too blunt and reactive to reflect the detailed and complex political, economic, jurisdictional, and remedial determinations necessary to resolve the claim to the satisfaction of all interested parties.

The courts can be only one part of a larger political process of negotiation and reconciliation. As noted in a recent report by a task force of the Canadian Bar Association, “While the courts may be useful to decide some native issues or to bring pressure on the parties to settle by some other means, it appears clear that judicial adjudication will not provide all of the answers to the issues surrounding native claims”.[339] Similarly, Chief Edward John of the First Nations Summit of British Columbia stated at our hearings:

It has never been the role of the Courts to define the detailed terms of the accommodation between the Crown and the First Nations. We have gone to the Courts in our own defence. We view them as a source of guidance for government, as to the rights of Aboriginal peoples and the resulting duties of government.

Chief Edward John
First Nations Summit of British Columbia
Prince George, British Columbia, 1 June 1993

Negotiations are clearly preferable to court-imposed solutions.[340] Litigation is expensive and time-consuming. Negotiation permits parties to address each other’s real needs and make complex and mutually agreeable trade-offs.[341] A negotiated agreement is more likely to achieve legitimacy than a court-ordered solution, if only because the parties participate more directly and constructively in its creation.[342] Negotiation also mirrors the nation-to-nation relationship that underpins the law of Aboriginal title and structures relations between Aboriginal nations and the Crown.[343]

Thus, the law of Aboriginal title serves as a backdrop to complex nation-to-nation negotiations concerning ownership, jurisdiction and co-management. By recognizing Aboriginal title, the law serves as an instrument for the enforcement of Aboriginal rights and provides Aboriginal nations with a measure of bargaining power during negotiations.[344] The Canadian Bar Association has noted that to have courts decide basic legal issues and then to rely on negotiations in the "shadow of the court" to resolve complex details is a promising development with respect to the protection of Aboriginal lands and resources.[345]

Governments must assist in achieving lasting reconciliation with Aboriginal nations concerning lands and resources. Indeed, the law requires the Crown to take active steps to protect Aboriginal lands and resources. The failure of current federal claims policy forces Aboriginal nations to seek redress through the courts, which, understandably, are reluctant to provide the continuing supervision necessary to enforce decisions concerning lands and resources. Aboriginal peoples face formidable hurdles in obtaining even interim relief pending final resolution of their claims. In light of the Crown's historical duty of protection, Parliament should enact legislation providing for substantial protection of Aboriginal lands and resources. In addition to creating opportunities for lasting agreements, the policy should seek to ease the remedial burden on the courts by providing an alternative and more flexible and effective form of interim relief tailored to the particular needs and interests of all parties.

Next we describe current law governing interim relief. Then we explain why the law of Aboriginal title imposes on the Crown a positive obligation to protect Aboriginal lands and resources. Finally, we propose ways for Parliament to begin to fulfil the Crown's historical duty of protection and achieve reconciliation with Aboriginal peoples concerning lands and resources.

### *Interim relief*

When an Aboriginal nation seeks to assert its title in a court of law, usually it seeks to prevent activity adverse to its interests from occurring on the disputed territory pending final resolution. Generally speaking, the law offers two types of interim relief in such circumstances. The first is to file a notice of pending litigation or of right less than ownership (a caveat, *lis pendens*, or caution) against the land in question in the appropriate land titles office, indicating the existence of an outstanding claim. Available in the four western provinces, the

territories, and parts of Ontario, this type of notice works as a temporary measure, designed to “freeze the title situation on the register until a claimant of an interest in land could take legal steps to protect the claim”.[346]

Aboriginal parties have encountered difficulty securing this form of protection. A notice of *lis pendens* is permitted only after a claimant has begun an action to secure the claim. Caveats can be challenged immediately in court. As a result, this protection is available only when an Aboriginal nation is ready to begin or defend a legal action. Moreover, and partly as a result of differences in statutory wording, the right to register a caveat or *lis pendens* varies from jurisdiction to jurisdiction. In 1977, the Supreme Court held that a caveat could be registered in the Northwest Territories by an Aboriginal nation only on lands for which a certificate of title had been issued, not on unpatented Crown land. Accordingly, a caveat could be registered only on lands already in the hands of third parties.[347] Other decisions provide that Aboriginal title and treaty rights do not constitute interests in land sufficient to support the registration of a caveat or certificate of *lis pendens.[348] Perhaps most important, the caveat and lis pendens are blunt forms of interim relief, in that they tend to prevent a wide range of activity on lands to which they apply, and they do not allow for tailored relief. Their blunt nature can contribute to judicial reluctance to see Aboriginal and treaty rights as registrable interests. As a result of all of these factors, caveats and lis pendens are of limited use to an Aboriginal nation seeking protection of its title pending the outcome of litigation.*

A second type of relief is the interlocutory injunction.[349] Available in all jurisdictions, an interlocutory injunction is an order restraining certain persons from engaging in certain activity pending trial or other disposition of an action. The court typically will examine a number of factors to determine whether an interlocutory injunction is appropriate in the circumstances, including the strength of the plaintiff’s case, whether the plaintiff or defendant would suffer irreparable harm, the balance of convenience, and the effect of an interlocutory injunction on the status quo.[350] The interlocutory injunction is much more flexible than a caveat or *lis pendens*, as the courts are better able to tailor relief to the particular facts of the case.

The interlocutory injunction, therefore, is a more promising means of obtaining interim relief in cases involving claims of Aboriginal title.[351] In 1973, for example, the James Bay Crees obtained from the Quebec Superior Court an interlocutory injunction stopping the James Bay I hydroelectric development. Although the injunction was suspended a week later by the court of appeal

pending a full appeal, the action did bring parties to the bargaining table.[352] However, it is not the ideal form of interim relief in all cases. Aboriginal nations have had greater success obtaining an interlocutory injunction where the territory at issue is a relatively small tract of land and where there are significant and special cultural and spiritual values at stake.[353] Moreover, as a condition of obtaining this injunction, the plaintiff generally must give an undertaking to pay to the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail in the final result.[354] This requirement, if insisted on by the courts, would make the interlocutory injunction an illusory form of interim relief for many Aboriginal nations seeking to uphold their title.

The availability of interim relief is closely related to the broader process of nation-to-nation negotiation. Interim relief against Crown and third-party activity on disputed territory is bound to serve as an incentive for the Crown to reach an agreement concerning lands and resources. Because negotiation is preferable to litigation as a means of resolving disputes between the Crown and Aboriginal nations, “courts should design their remedies to facilitate negotiations between First Nations, governments and other affected interests”.[355] Aboriginal peoples will secure substantive gains in negotiations only if courts order remedies that give Aboriginal parties more bargaining power than they have under Canadian law at present.

Judicial caution in this area is fuelled in no small measure by the same factors that make negotiation preferable to litigation. Although interlocutory injunctions are flexible interim measures, the courts are not the most appropriate institutions to rule on the complex political, economic, jurisdictional and remedial issues raised by cases involving Aboriginal title. Interim relief may adversely affect existing third-party interests and severely disrupt resource-based communities in the area, as well as introduce significant uncertainty about the future. We urge the courts to make creative use of the interlocutory injunction as a means of facilitating negotiations, but we recognize the difficulties associated with interim relief in the absence of a fair and effective claims policy. For this reason, we believe that reform should provide a quick and reliable means of obtaining interim relief to protect Aboriginal lands and resources from further encroachment during negotiations. We propose that the parties reach interim relief agreements before final agreement. Pending these developments, however, Aboriginal parties require remedies from the courts that both increase their bargaining power and facilitate negotiations with the Crown. The institutional constraints on the courts do not outweigh the pressing need to protect rights associated with Aboriginal title from further erosion.

### *A duty to protect Aboriginal lands and resources*

The law of Aboriginal title requires governments to take active steps to protect Aboriginal lands and resources. This positive dimension of the law emerges from the text, structure and jurisprudence of section 35 of the *Constitution Act, 1982*, which together suggest that government action, in the form of negotiations, is central to the constitutional recognition and affirmation of Aboriginal and treaty rights. It is reflected also in case law addressing the Crown's fiduciary relationship with Aboriginal peoples, which "emphasize[s] the responsibility of government to protect the rights of Indians arising from the special trust relationship created by history, treaties and legislation".[356] It is supported as well by emerging international legal norms, which impose extensive positive obligations on governments to recognize and protect a wide array of rights with respect to lands and resources.

With respect to the *Constitution Act, 1982*, section 35 recognizes and affirms existing Aboriginal rights and requires the courts to assess the constitutional validity of laws that impair existing Aboriginal rights. As we have seen, effective recognition of Aboriginal rights is the product of negotiation at least as much as judicial fiat. Indeed, section 35(3) of the *Constitution Act, 1982* reflects this unique mix of negotiation and adjudication by recognizing and affirming "rights that now exist by way of land claims agreements or may be so acquired". Equally, section 35.1 commits the federal and provincial governments to inviting Aboriginal participation in discussions of proposed constitutional amendments affecting Aboriginal rights. These aspects of section 35 underscore the fact that government as well as Aboriginal action — in the form of nation-to-nation negotiations — is central to the constitutional recognition and affirmation of Aboriginal rights. As stated by the Supreme Court, section 35 "provides a solid constitutional base upon which subsequent negotiations can take place".[357]

The Crown's fiduciary relationship with Aboriginal peoples also reflects its historical obligation to protect Aboriginal lands and resources. Duties with respect to Aboriginal peoples have been recognized in at least three different contexts. First, it is well settled that the federal Crown is under fiduciary obligation to act in the interests of an Indian band when the band surrenders land to the Crown for third-party use.[358] Second, in some contexts at least, the provincial Crown may owe fiduciary obligations to Aboriginal peoples upon the unilateral extinguishment of Aboriginal rights with respect to land.[359] Third, jurisprudence under section 35(1) of the *Constitution Act, 1982* suggests that

government action that interferes with the exercise of Aboriginal rights recognized and affirmed by section 35(1) creates fiduciary duties on the government responsible for the interference in question. More generally, the Supreme Court of Canada stated in *Sparrow* that

[T]he *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin*, together with *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[360]

The fact that the relationship between the government and Aboriginal peoples is trust-like, rather than adversarial has important implications for the role of government with respect to Aboriginal lands and resources.[361] It requires institutional arrangements to protect them, and it requires government not to rely simply on the 'public interest' as justification for limiting the exercise of Aboriginal rights with respect to them.[362] Moreover, it requires government to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources. In the words of Justice Dubé of the Federal Court of Canada,

it is ... the duty of the federal government to negotiate with Indians in an attempt to settle ... rights ... .The government's task is to determine, define, recognize and affirm whatever aboriginal rights existed.[363]

Emerging international legal principles also specify that governments are under extensive obligations to protect Aboriginal lands and resources. The Draft Declaration on the Rights of Indigenous Peoples, prepared by a sub-commission of the United Nations Commission on Human Rights, proposes to recognize that "indigenous peoples have the right to self-determination" and that "[b]y virtue of that right they freely determine their political status and freely pursue their economic social and cultural development".[364] Accordingly, the draft declaration proposes to recognize, among others, indigenous rights of autonomy and self-government, the right to record, practise and teach spiritual and religious traditions, rights of territory, education, language and cultural property, and the right to maintain and develop indigenous economic and social systems.

The terms of the draft declaration support the view that government ought to provide for a fair and effective claims process, one that imposes positive obligations on government to reach agreements protecting Aboriginal rights with respect to lands and resources. Indeed, article 37 of the draft declaration provides that states shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice.

Article 26 provides:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.

James Anaya describes the draft declaration as “an authoritative statement of norms concerning Indigenous peoples on the basis of generally applicable human rights principles”, and notes that it also “manifests a corresponding consensus on the subject among relevant actors”.[365]

In addition, convention 107 of the International Labour Organisation, adopted in 1957, while advocating the “integration” of indigenous populations into national communities, also calls upon governments to develop co-ordinated and systematic action to protect indigenous populations and to promote their social, economic and cultural development.[366] The International Labour Organisation revised convention 107 in its convention 169 of 1989.[367] It recognizes “the aspirations of these indigenous peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live”. It then lists a wide array of rights that attach to Indigenous peoples and numerous responsibilities that attach to governments, including obligations to protect indigenous lands and resources.[368] Canada is not yet a party to the convention, but, again according to James Anaya, the

convention “represents a core of expectations that are widely shared internationally and, accordingly, it reflects emergent customary international law generally binding upon the constituent units of international community”.[369]

We agree that both the draft declaration and convention 169 are authoritative statements of norms concerning Indigenous peoples, and we urge the government of Canada to protect Aboriginal lands and resources in accordance with those norms.

***Summary***

The law of Aboriginal title provides a firm foundation for contemporary protection of Aboriginal lands and resources. It imposes extensive obligations on the Crown to protect them. These duties of the Crown oblige Parliament to enact fair and effective institutional processes to facilitate negotiated solutions. The law requires government not to rely simply on the public interest as justification for limiting the exercise of Aboriginal rights but to act in the interests of Aboriginal peoples when negotiating arrangements concerning their lands and resources. Moreover, because the courts cannot easily make the detailed judgements necessary to address all the concerns of all the parties in a dispute involving Aboriginal title, any new claims processes should provide for effective means of obtaining interim relief.

## 6.3 A New Approach to Lands and Resources

The many criticisms of existing land claims policies are cogent. Government’s failure to heed the volume and quality of criticism has fostered the perception that existing policies serve the needs of the broader public at the expense of Aboriginal peoples’ rights. Courts alone cannot provide the detailed and complex determinations necessary to provide lasting solutions to all interested stakeholders. A new approach is urgently needed. Federal and provincial governments must take seriously their legal and constitutional obligations. They must accept that the Crown is under a positive obligation to protect Aboriginal lands and resources. They must enact and participate in institutional processes that result in the definition, recognition and protection of the rights of Aboriginal peoples to lands and resources. They must give Aboriginal nations much greater control over and access to their traditional territories. The treaty making and treaty implementation and renewal processes described earlier in this volume (see Chapter 2), together with related reforms, can accomplish these objectives.

### *New terms and new processes*

The term ‘land claims policy’ suggests that the burden of proof regarding lands and resources lies with Aboriginal parties. Long-held and totally misconceived ideas about the doctrines of discovery and *terra nullius* underpin the concept that Aboriginal title is a mere cloud or burden upon the Crown’s underlying title (see Volume 1, Chapter 2). The rights of Aboriginal peoples to lands and resources are perceived as somewhat nebulous claims against the real rights of the Crown. The purpose of a land claims agreement has been to dispose of the claim by extinguishing Aboriginal title and perfecting the ‘real’ Crown title in exchange for a set of contractual rights and benefits. By contrast, Aboriginal groups say that it is government that should bear the burden of establishing the validity of its claim to the unfettered administration and control of Aboriginal lands, and that the Crown, as a fiduciary obliged to protect the interests of Aboriginal people, should act with propriety.

Moreover, under current policies, claims based on non-fulfilment of a treaty promise or other legal obligation are seen as claims against the dominant system of vested rights and the orderly conduct of business and, therefore, as annoyances that must be put to an end. This fosters the view that Aboriginal claims should be settled, if at all, on the basis of a cash payment in exchange for a release, often accompanied by a purported extinguishment of land rights. In addition, existing categories of specific, comprehensive, and other claims are defined arbitrarily, containing limitations not in keeping with the Crown’s fiduciary obligations and too often plagued by conflicts of interest on the part of government.

Finally, as policy, land claims determination is subject to government control of substance and procedure. Land claims policies define what types of claims governments will recognize and those to which they will respond. These policies are created unilaterally by government, interpreted unilaterally by government, and amended unilaterally by government, with a minimum of outside scrutiny. They are not entrenched in law or subject to judicial review.

These assumptions gravely misrepresent the nature of Aboriginal rights and make federal policy part of the problem instead of part of the solution. First, Aboriginal claims are not entreaties against the Crown’s superior underlying title. Aboriginal claims are assertions of Aboriginal *rights* — rights that inhere in Aboriginal nations because of time-honoured relationships with the land, which predate European contact. Aboriginal rights do not exist by virtue of Crown title; they exist notwithstanding Crown title. They are recognized by section 35(1) of

the *Constitution Act, 1982*, and they protect matters integral to Aboriginal identity and culture, including systems of government, territory and access to resources. Any remaining authority the Crown may enjoy is constrained by the fact that it is required by law to act in the interests of Aboriginal peoples. Instead of readily invoking the public interest to oppose Aboriginal interests, the Crown should uphold Aboriginal interests.

Second, the extinguishment of Aboriginal title in exchange for a cash payment is at odds with constitutional recognition and affirmation of Aboriginal rights. Extinguishment is also out of step with the Crown's fiduciary relationship with Aboriginal peoples. A fiduciary should not attempt to destroy what it is required to protect. The Crown should not seek the extinguishment of Aboriginal title; it should seek the recognition of Aboriginal title. Treaties should serve as solemn acts of mutual recognition of Aboriginal and Canadian ways of structuring relationships with the land. They should enable the coexistence of otherwise competing systems of land tenure and governance.

Third, the rights of Aboriginal peoples to lands and resources should not be subject to the shifting sands of policy initiatives developed unilaterally by governments. The protection and enforcement of Aboriginal rights require independent, legislated processes that allow for extensive Aboriginal participation and nation-to-nation negotiations. These new processes must address the fact that Aboriginal territories have been reduced by settlement, dislocation and development to such an extent that the very identities of Aboriginal nations are seriously threatened. Federal, provincial, territorial and Aboriginal governments must work together to establish processes that enable a significant expansion of Aboriginal territories. These processes should not interfere with third-party interests, but they must provide Aboriginal nations with sufficient lands and resources to reverse the devastating effects of dispossession and allow for the possibility of Aboriginal self-sufficiency.

Under the approach we propose, instead of being guided by a *policy* developed unilaterally by federal authorities, which establishes preconditions for negotiations and constrains possible outcomes based on the preferences of the Crown, disputes over lands and resources should be resolved through legitimate *processes* of consultation and negotiation enshrined in legislation. Negotiation is the best and most appropriate way to address these issues, and land claims policies should be replaced by treaty processes, primarily under the auspices of regional treaty commissions, with the Aboriginal Lands and Treaties Tribunal performing supplementary functions.

### *Integrating treaty processes with lands and resources*

Current federal policy categorizes Aboriginal claims as comprehensive claims, specific claims, or claims of a third kind. We have struggled to find a more appropriate vocabulary to describe the range of unresolved lands and resources issues — one that embodies the four principles of the new relationship: mutual recognition, mutual respect, sharing and mutual responsibility (see Volume 1, Chapter 16). We have found it in the language of relationships, rights and reconciliation. As we have emphasized throughout our report, the relationship between Aboriginal peoples and other Canadians must be renewed in an honourable way. Aboriginal and treaty rights to lands and resources, along with other Aboriginal rights, must be taken seriously. They must be acknowledged, protected and given effect by institutions of government. And the rights of other Canadians must be reconciled with them.

When seen in this light, the separate categories of claims simply vanish. They become part of a broader process of reconciliation based on real and enforceable rights. Treaty-making processes will supersede the comprehensive claims process of the recent past. They will enable Aboriginal nations to enter new treaty relationships to define their rights to lands and resources, governance and many other matters. Treaty-making processes must be open to all Aboriginal groups that can meet the criteria set out in the proposed recognition act (see Chapter 3).

Treaty implementation and renewal processes will address the spirit, intent and legal effect of existing treaties, including those pre-Confederation and numbered treaties that the Crown has interpreted as treaties of extinguishment. As a result, many specific claims and claims of a third kind will become particular items for discussion in broader implementation and renewal negotiations. There must be a presumption in such negotiations that Aboriginal signatories did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by agreeing to a treaty relationship. Where the text of an historical treaty makes reference to a blanket or wholesale cession of lands, the treaty relationship mandates the sharing of both the territory and the right to govern and manage it, as opposed to a cession of the territory to the Crown. Implementation and renewal processes thus will attempt to determine the true spirit and intent of existing treaty relationships and bring them up to date with renewed vigour and relevance.

In time, treaty processes will make specific claims policy obsolete. Future treaties and their associated implementation agreements will contain dispute-

resolution mechanisms to address past breaches of the Crown's duty as well as new disputes that arise from time to time. Likewise, existing treaties will be supplemented by agreements to address past and future breaches of duty and other disputes that arise within the treaty relationship. Most disputes currently understood as specific claims will be settled through broader treaty implementation and renewal processes. As a result, the relationship between Aboriginal peoples and other Canadians will be renewed in an honourable way. Aboriginal and treaty rights to lands and resources, along with other Aboriginal rights, will be taken seriously, and they will be reconciled with the rights of other Canadians.

However, Aboriginal people should not have to wait for resolution of a specific claim through this broader treaty implementation and renewal process. They should be free to seek its speedy resolution through negotiations outside the broader process in ways that do not replicate defects in current policy. When all other means of reconciliation fail, they should be able to place particular issues concerning the legal rights of parties to an existing treaty before an independent tribunal for binding decisions and appropriate relief. We propose that the Aboriginal Lands and Treaties Tribunal be authorized to hear and make binding decisions concerning specific claims in such circumstances. In addition, we propose that the tribunal's jurisdiction be sufficiently flexible to permit it to resolve claims of a third kind, as well as other claims that do not fit within the categories of current policy.

The treaty-making and treaty implementation and renewal processes will share important structural similarities. Both processes will ensure that government negotiates in good faith and with Aboriginal interests in mind. Both processes will be predicated on the existence of Aboriginal rights concerning lands and resources. Both will aim to facilitate the negotiation of agreements that recognize those rights and reconcile them with the rights of other Canadians. Finally, both will ensure that Aboriginal nations are provided with enough territory to foster economic self-reliance and cultural and political autonomy. Together, these processes will foster a new relationship between Aboriginal nations and the Crown — a relationship based on recognition, respect, sharing and responsibility.

### *Principles to guide federal policy and treaty processes*

We have proposed the preparation of a royal proclamation to set out the fundamental principles of the bilateral nation-to-nation relationship and the treaty-making and treaty implementation and renewal processes. We have

proposed that the government of Canada introduce companion legislation to accomplish a number of objectives, among them the establishment of institutions to fulfil treaty processes, including an Aboriginal Lands and Treaties Tribunal. In addition, we recommend the development of a Canada-wide framework agreement, entered into by the federal, provincial and territorial governments and Aboriginal nations, to establish the scope of treaty making and treaty implementation and renewal negotiations and a fiscal formula for the financing of the Aboriginal order of government.

Several key principles relating to lands and resources must inform federal policy both before and during negotiations. In our special report, *Treaty Making in the Spirit of Co-existence,* which addressed federal policy as it relates to Aboriginal nations that have yet to enter into treaty with the Crown, we presented some of these principles as recommendations for reform of federal treaty-making policy. However, these principles must inform both treaty making and treaty implementation and renewal. The federal government should seek to ensure that these principles find expression in a Canada-wide framework agreement. However, the government should not wait for consensus on the framework agreement to amend its current claims policies, because some Aboriginal nations may be ready to enter into negotiations before consensus is reached.

**Recommendation**

The Commission recommends that

**2.4.1**

Federal policy and all treaty-related processes (treaty making, implementation and renewal) conform to these general principles:

(a) Aboriginal title is a real interest in land that contemplates a range of rights with respect to lands and resources.

(b) Aboriginal title is recognized and affirmed by section 35(1) of the *Constitution Act, 1982.*

(c) The Crown has a special fiduciary obligation to protect the interests of Aboriginal people, including Aboriginal title.

(d) The Crown has an obligation to protect rights concerning lands and resources that underlie Aboriginal economies and the cultural and spiritual life of Aboriginal peoples.

(e) The Crown has an obligation to reconcile the interests of the public with Aboriginal title.

(f) Lands and resources issues will be included in negotiations for self-government.

(g) Aboriginal rights, including rights of self-government, recognized by an agreement are 'treaty rights' within the meaning of section 35(1) of the *Constitution Act, 1982.*

(h) Negotiations between the parties are premised on reaching agreements that recognize an inherent right of self-government.

(i) Blanket extinguishment of Aboriginal land rights will not be sought in exchange for other rights or benefits contained in an agreement.

(j) Partial extinguishment of Aboriginal land rights will not be a precondition for negotiations and will be agreed to by the parties only after a careful and exhaustive analysis of other options and the existence of clear, unpressured consent by the Aboriginal party.

(k) Agreements will be subject to periodic review and renewal.

(l) Agreements will contain dispute resolution mechanisms tailored to the circumstances of the parties.

(m) Agreements will provide for intergovernmental agreements to harmonize the powers of federal, provincial, territorial and Aboriginal governments without unduly limiting any.

Federal policy and treaty processes must conform to a number of specific principles relating to lands and resources: Aboriginal nations must be provided with sufficient territory to foster economic self reliance and cultural and political autonomy; traditional Aboriginal territories should be defined as falling into one of several categories of jurisdiction to foster mutual coexistence; third-party interests must receive protection in negotiations; and parties must reach interim

relief agreements that protect Aboriginal lands and resources during negotiations.

Providing sufficient territory to foster economic self-reliance and cultural and political autonomy

A major objective of treaty making and treaty implementation and renewal is to facilitate Aboriginal economic self-reliance, cultural autonomy and self-government. To accomplish this, Aboriginal nations must have more territory and rights of access to resources than they do now under Canadian law. Without adequate lands and resources, Aboriginal nations will be pushed to the edge of economic, cultural and political extinction. This is as true for nations that have yet to enter into treaty with the Crown as it is for those that are party to historical treaties.

**Recommendations**

The Commission recommends that

**2.4.2**

Federal, provincial and territorial governments, through negotiation, provide Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal economic self-reliance and cultural and political autonomy.

**2.4.3**

The goal of negotiations be to ensure that Aboriginal nations, within their traditional territories, have

(a) exclusive or preferential access to certain renewable and non-renewable resources, including water, or to a guaranteed share of them;

(b) a guaranteed share of the revenues flowing from resources development; and

(c) specified preferential guarantees or priorities to the economic benefits and opportunities flowing from development projects (for example, negotiated community benefits packages and rights of first refusal).

**2.4.4**

Aboriginal nations, through negotiation, receive, in addition to land, financial transfers, calculated on the basis of two criteria:

(a) *developmental needs* (capital to help the nation meet its future needs, especially relating to community and economic development); and

(b) *compensation* (partial restitution for past and present exploitation of the nation's traditional territory, including removal of resources as well as disruption of Aboriginal livelihood).

An Aboriginal nation engaged in treaty making or treaty renewal with the Crown will see the provision of more territory and access to resources as critical components of the negotiation process. The amount of land necessary to meet present and future economic and cultural needs will occasion extensive discussions. Some of the historical treaties established the amount of reserve land by a predetermined formula (for example, in the western half of the province of Canada, it was 640 acres per family of five). The *Manitoba Act, 1870* provides for the appropriation of ungranted Crown lands, "to the extent of one million four hundred thousand acres thereof, for the benefit of the families of the half-breed residents".[370] There have also been more recent attempts to define specific amounts. In the spring of 1995, for example, the government of British Columbia proposed that the amount of settlement land (including existing reserves) to be set apart as a result of the British Columbia Treaty Commission process be less than five per cent of the province's total land base.[371]

If parties to negotiations wish to establish a per capita formula or a ceiling as part of a framework agreement, that is certainly their prerogative. Governments should not impose such a formula or ceiling as a precondition for negotiations. This is unnecessary, because the amount of land available for selection will vary by region and local circumstances. Where the territory is extensively populated, for example, it may be appropriate for the Crown to provide a limited amount of land plus sufficient funds to enable the Aboriginal party to purchase additional land from willing third parties.

**Recommendation**

The Commission recommends that

**2.4.5**

Negotiations on the amount and quality of additional lands, and access to resources, be guided by the

(a) size of the territory that the Aboriginal nation traditionally occupied, controlled, enjoyed, and used;

(b) nature and type of renewable and non-renewable resources, including water, that the Aboriginal nation traditionally had access to and used;

(c) current and projected Aboriginal population;

(d) current and projected economic needs of that population;

(e) current and projected cultural needs of that population;

(f) amount of reserve or settlement land now held by the Aboriginal nation;

(g) productivity and value of the lands and resources and the likely level of return from exploitation for a given purpose;

(h) amount of Crown land available in the treaty area; and

(i) nature and extent of third-party interests.

Aboriginal nations require not only more territory, but also territory of value. In the past, governments often tried to limit the lands available for reserve selection to those that were of least value to other interested parties.

**Recommendation**

The Commission recommends that

**2.4.6**

In land selection negotiations, federal, provincial and territorial governments follow these principles:

(a) No unnecessary or arbitrary limits should be placed on lands for selection, such as

(i) the exclusion of coastlines, shorelines, beds of water (including marine areas), potential hydroelectric power sites, or resource-rich areas;

(ii) arbitrary limits on size, shape or contiguity of lands; or

(iii) arbitrary limits on the ability of the Aboriginal nation to purchase land in order to expand its territory.

(b) Additional lands to be provided from existing Crown lands within the territory in question.

(c) Where parties are seeking to renew an historical treaty, land selection not be limited by existing treaty boundaries (for example, the metes and bounds descriptions contained in the post-Confederation numbered treaties).

(d) Provincial or territorial borders not constrain selection negotiations unduly.

(e) Where Crown lands are not available in sufficient quantity, financial resources be provided to enable land to be purchased from willing third parties.

In relation to points (c) and (d), for example, Dene Th'a, whose existing reserve lands are located in northern Alberta, are party to Treaty 8, but their traditional territory also covers portions of British Columbia and the Northwest Territories (see Figure 4.4). Treaty 5, which covers well over half of Manitoba, as well as small portions of Ontario and Saskatchewan, provides another example. The Cree, Oji-Cree, Ojibwa and Dene nations of Treaty 5 may seek to enter into the treaty renewal process together, although they would probably choose to negotiate separately under that umbrella and negotiate the selection of lands based on their traditional territories.

The Commission believes that the principles outlined in recommendations 2.4.1 to 2.4.6 must be given a status that gives all parties the expectation of stability, continuity and accountability. We are acutely aware that negotiating appropriate reallocation of lands and resources and land-sharing agreements will be the work of a generation. If the required trust is to be generated and sustained over this process, stability and accountability are essential.

Guiding principles for negotiations with respect to lands and resources must move from the realm of policy, where they can be altered any time a minister persuades cabinet that change is opportune, to the more stable realm of legislation. Equally, officials charged with implementing policy need the firmer discipline of being accountable to legislative requirements rather than policy guidelines. Where negotiations are involved, flexibility is important, but the promise of stability and legal accountability is even more crucial if trust is to be established and maintained.

It would be advisable for the federal government to legislate these principles with full consultation between provincial governments and representatives of Aboriginal peoples. The principles should be adopted immediately by the federal government as policy guiding negotiations with Aboriginal nations, but they should also be the subject of full discussion during the development of the Canada-wide framework agreement and revised appropriately as a result. Only then should the federal government move to incorporate the revised principles into legislation.

**Recommendation**

The Commission therefore recommends that

**2.4.7**

The government of Canada adopt the principles outlined in recommendations 2.4.1 to

2.4.6 as policy to guide its interaction with Aboriginal peoples on matters of lands and resources allocation with respect to current and future negotiations and litigation.

**2.4.8**

The government of Canada propose these principles for adoption by provincial and territorial governments as well as national Aboriginal organizations during the development of the Canada-wide framework agreement.

**2.4.9**

Following such consultations, the government of Canada propose to Parliament

that these principles, appropriately revised as a result of the consultations, be incorporated in an amendment to the legislation establishing the treaty processes.

Categorizing traditional territories to foster coexistence

We propose that negotiations aim to categorize traditional territories in three ways to identify, as exhaustively and precisely as possible, the rights of each party with respect to lands, resources and governance.

On lands in a first category (Category I lands), full rights of ownership and primary jurisdiction over lands and renewable and non-renewable resources, including water, would belong to the Aboriginal nation in accordance with the traditions of land tenure and governance of the nation in question. Category I lands would comprise any reserve and settlement lands currently held by the nation and, selected in accordance with the factors listed in recommendation 2.4.5, any additional lands necessary to foster economic self-reliance and cultural and political autonomy. On such lands, Aboriginal relationships with the land could be recognized and systems of land tenure and governance implemented more or less in their entirety. For example, Aboriginal people commonly regard their lands and resources as a collective heritage or property. Tenure can be on the basis of an extended family, community or nation, and there might be customary limits and controls on the use, transfer, and alienation of lands and resources. An Aboriginal nation would be free to structure its relationship with Category I lands in accordance with its world view, perhaps by building in legal obligations to serve as stewards for future generations. It could opt for provisions enabling it to grant future interests to third parties in the form of conventional resource leases or permits.[372]

On lands in a second category (Category II lands), a number of Aboriginal and Crown rights concerning lands and resources would be recognized by the agreement, and governance and jurisdiction would be shared among the parties. Category II lands would form a portion of the traditional territory of the Aboriginal nation, determined by the degree to which Category I lands fostered self-reliance.

For example, if lands allocated in Category I were insufficient to provide the means for substantial self-reliance for the Aboriginal nation and its citizens, that nation would obtain a larger share of the revenues generated by taxation or royalties from economic activity on Category II lands. Co-jurisdictional and co-management bodies could be empowered to manage the lands and direct and

control development and land use. Rights to traplines and fishing sites could be recognized in accordance with Aboriginal tenure systems and could coexist with Crown rights of mineral exploration, in accordance with provincial or territorial law. Co-jurisdiction refers to an institutional arrangement that allows for representation on a nation-to-nation basis, whereas co-management refers to an institutional arrangement that is more local in nature, allowing for representation of local Aboriginal and non-Aboriginal communities. Both types of regime should be based on the principle of parity of representation among parties to the treaty. Mutual recognition would allow for revenue sharing based on identified benefits flowing from Aboriginal and Crown rights recognized and affirmed by the agreement. In terms of existing uses, Category II lands are already shared lands. Agreements negotiated according to the principles proposed here would give legal force and effect to these uses, in a way that reflects the fundamental rights — and not necessarily the economic and demographic power — of each party.

On lands in a third category (Category III lands), a complete set of Crown rights with respect to lands and governance would be recognized by the agreement, subject to residual Aboriginal rights of access to historical and sacred sites and hunting, fishing and trapping grounds, Aboriginal participation in national and civic ceremonies and events, and symbolic representation in certain institutions. These lands would likely constitute the largest of the three categories and consist of the majority of Crown lands in the area covered by the treaty, all municipal lands, and most other organized local jurisdictions such as townships or local improvement districts (especially where these consist of settled agricultural or industrial lands). Even on lands in this category, however, some Aboriginal rights could be recognized to acknowledge Aboriginal peoples' historical and spiritual relationships with such lands. For example, Aboriginal people, as a matter of protocol, could serve as diplomatic hosts at significant events of a civic, national or international nature that take place on their territory.

Category I lands will provide the maximum degree of autonomy for Aboriginal people. They will provide for coexistence rather than sharing and minimize the need for harmonization and co-operation. Category II lands will require shared jurisdiction and management. As a general rule, both the expansion of the Aboriginal land base through Category I selections, and security of access to resources on public lands and joint management of these resources on Category II lands, will be necessary to achieve self-reliance and self-government. Although the appropriate mix in any particular situation should be determined by the parties, selection negotiations should seek to maximize the

amount of Category I lands available to the Aboriginal nation, and the amount selected should result in a significant increase of territory under Aboriginal control.

As can be seen in Appendix 4A, versions of this categorization scheme already exist in the land provisions of the comprehensive claims agreements negotiated since 1975. Quebec's offer to the Attikamek-Montagnais people, also described in Appendix 4A, relies on a version of this scheme. This tripartite classification is in marked contrast to the post-Confederation treaty model, whereby the written text provided that Aboriginal peoples were to receive very small allocations of reserve land, with their rights to resources off-reserve generally confined to limited harvesting (hunting, fishing and trapping) privileges.

This tripartite categorization of land should not be insisted on at the expense of reaching agreement on ownership, use, and access rights concerning features of the environment and common resources not separable by land categories, (for example, flowing waters, fish, some migratory species, and animals with large ranges, such as caribou). In respect of these, the appropriate approach would be to negotiate institutional mechanisms to allow for resource sharing, regardless of location. Concerning fish specifically, an arrangement respecting shared allocation and governance should be negotiated, independent of riparian, coastline, or water bed ownership. Major fisheries, such as the salmon fisheries on the Fraser and Skeena rivers in British Columbia, would be shared and co-managed as a whole, without regard to land categories. Existing caribou management boards (see Appendix 4B) provide a model of how this might be done. Similarly, some water rights might be allocated through a co-management regime that includes all categories of land.

This tripartite categorization of lands should be employed in a manner consistent with the models of governance discussed in Chapter 3. In particular, and along the lines suggested by the nation-based model of government, we propose that an Aboriginal nation exercise primary and paramount legislative authority on Category I lands, shared legislative authority on Category II lands, and limited, negotiated authority on Category III lands.

**Recommendations**

The Commission recommends that

**2.4.10**

Negotiations aim to describe the territory in question in terms of three categories of land. Using these three categories will help to identify, as thoroughly and precisely as possible, the rights of each of the parties with respect to lands, resources and governance.

**2.4.11**

With respect to Category I lands,

(a) The Aboriginal nation has full rights of ownership and primary jurisdiction in relation to lands and renewable and non-renewable resources, including water, in accordance with the traditions of land tenure and governance of the nation in question.

(b) Category I lands comprise any existing reserve and settlement lands currently held by the Aboriginal nation, as well as additional lands necessary to foster economic and cultural self-reliance and political autonomy selected in accordance with the factors listed in recommendation 2.4.5.

**2.4.12**

With respect to Category II lands,

(a) Category II lands would form a portion of the traditional territory of the Aboriginal nation, that portion being determined by the degree to which Category I lands foster Aboriginal self-reliance.

(b) A number of Aboriginal and Crown rights with respect to lands and resources would be recognized by the agreement, and rights of governance and jurisdiction could be shared among the parties.

**2.4.13**

With respect to Category III lands, a complete set of Crown rights with respect to lands and governance would be recognized by the agreement, subject to residual Aboriginal rights of access to historical and sacred sites and hunting, fishing and trapping grounds, participation in national and civic ceremonies and events, and symbolic representation in certain institutions.

**2.4.14**

Aboriginal nations exercise legislative authority as follows:

(a) primary and paramount legislative authority on CategoryI lands;

(b) shared legislative authority on Category II lands; and

(c) limited, negotiated authority exercisable in respect of citizens of the nation living on Category III lands and elsewhere and in respect of access to historical and sacred sites, participation in national and civic ceremonies and events, and symbolic representation in certain institutions.

Protecting third-party rights and interests

The objective of providing adequate territory to facilitate self-sufficiency and self-government must be balanced with the need to protect third-party rights and interests. In common law, these would include rights of fee simple and lesser legal interests, as well as general rights to use Crown lands. In Quebec these would include the right of ownership, dismemberments of ownership (real rights of enjoyment), and personal rights of enjoyment in connection with land, as well as general rights to use Crown lands. Accordingly, the Commission believes that parties to treaty processes should adhere to certain principles when negotiating the selection and categorization of territory.

Common law fee simple interests and civil law rights of ownership

The need to provide land and access to resources should not be met at the expense of the rights and interests of those who currently own property in fee simple at common law or who are titularies of a right of ownership in civil law. Except where there are willing sellers, or in exceptional circumstances outlined below, agreements should not modify, limit or extinguish common law fee simple interests or civil law rights of ownership. However, parties to the treaty process should be free to include land held at common law in fee simple or land owned in Quebec within Category II lands. The inclusion of such lands in Category II lands would not change the legal nature of the common law right of fee simple or the civil law right of ownership, but would subject activity occurring on such land to the regulatory authority of co-jurisdictional and co-management bodies empowered to manage Category II lands and direct and control development and land use. An example of this arrangement is the

Wendaban Stewardship Authority, which has exercised jurisdiction over roughly

400 square kilometres of land northwest of Temagami, Ontario, within the traditional territory of the Teme-Augama Anishinabai. The stewardship authority is responsible for monitoring, regulating and planning all uses and activities ranging from recreation and tourism, fish and other wildlife to land development and cultural heritage, including such uses and activities on private land within the territory in question (see Appendix 4B). In Category III lands, common law fee simple interests and civil law rights of ownership would continue to be subject to federal, provincial or territorial laws.

**Recommendations**

The Commission recommends that

**2.4.15**

As a general principle, lands currently held at common law in fee simple or that in Quebec are owned not be converted into Category I lands, unless purchased from willing sellers.

**2.4.16**

In exceptional cases where the Aboriginal nation's interests clearly outweigh the third party's rights and interests in a specific parcel, the Crown expropriate the land at fair market value on behalf of the Aboriginal party to convert it into Category I lands. This would be justified, for example, where

(a) a successful claim for the land might have been made under the existing specific claims policy based on the fact that reserve lands were unlawfully or fraudulently surrendered in the past; or

(b) the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance).

**2.4.17**

Lands that at common law are held in fee simple or that in Quebec are owned can be included within Category II lands.

Lesser interests on Crown lands

At common law, in addition to fee-simple interests, lesser interests can be grouped into two basic categories:

• exclusive tenures, such as cottage or other recreational property leases, which are akin to fee simple interests, in that the holders can exclude access, use or occupation by another party, but apply for only a limited period; and

• non-exclusive tenures, such as forest licences. These provide defined rights of use and benefit, but do not necessarily exclude other interests. Several such tenures, such as a mining claim, forest licence or grazing licence, can apply simultaneously to the same piece of land.

Under the civil law, in addition to the right of ownership, other real rights of enjoyment can be claimed in land, and other personal rights of enjoyment can be claimed in respect of land. For present purposes, these rights can be considered to be of two main types:

• Rights of exclusive enjoyment. These include major dismemberments of ownership, such as the right of emphyteusis or usufruct, which are akin to ownership in that the titulary can exclude access, use or occupation by another party, but exist for only a limited period. Also of this kind are certain personal rights, such as those under a lease, which provide for exclusive rights of enjoyment of an immoveable but are also of limited duration.

• Non-exclusive rights of enjoyment. These include rights such as those granted under forest permits, which may be either lesser dismemberments of ownership or personal rights of enjoyment, but do not necessarily preclude the existence of other similar rights. Several lesser dismemberments and personal rights of enjoyment, such as a mining claim, a forest permit or a grazing permit, can apply simultaneously to the same piece of land.

Parties must be able to select lands subject at common law to third-party interests less than fee simple, or under the civil law to third-party rights of enjoyment other than ownership, for conversion into Category I lands, but if such lands are selected, the treaty should provide that the Aboriginal nation respect the original terms of all common law tenures and the original terms by which all dismemberments of ownership and personal rights of enjoyment in the civil law were created. Thus, at common law, there would be a change of landlord, in that the Aboriginal nation would replace the Crown as the beneficial owner and receive rentals or other revenues. The existing lease, however,

would continue to structure relations between the new lessor and lessee. Under the civil law, there would also be a change of owner, and the Aboriginal nation would replace the Crown as the owner entitled to receive rents or other revenues. The existing contractual agreement, however, would continue to structure relations between the new owner and the titulary of the dismemberment of ownership or the personal right of enjoyment.

As in the case of common law fee-simple interests or civil law rights of ownership, we propose that in exceptional circumstances, where Aboriginal interests significantly outweigh third-party rights and interests, the Crown should revoke the common law tenure or the civil law dismemberment of ownership or personal right of enjoyment, at fair market value, on behalf of the Aboriginal party to convert it into Category I lands. This would occur where the land in question might otherwise have been the subject of a successful claim under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past), or where the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance).

In addition, parties must be free to include within Category II lands lands that are held in less than fee simple at common law and lands held by virtue of a dismemberment of ownership or a personal right of enjoyment under the civil law. If lands held under such lesser common law interests or by virtue of such civil law rights are included in Category II lands, they would fall under the authority of the co-jurisdictional and co-management bodies empowered to manage the lands and direct and control development and use. In Category III lands, common law interests less than fee simple and civil law rights of enjoyment other than ownership would continue to be subject to federal, provincial or territorial laws.

**Recommendations**

The Commission recommends that

Lands affected at common law by third-party interests less than fee simple or under the civil law by third-party rights of enjoyment other than ownership may be selected as Category I lands. If such lands are selected, the Aboriginal nation is to respect the original terms of all common law tenures and all civil law dismemberments of ownership and personal rights of enjoyment.

**2.4.19**

In exceptional circumstances, where Aboriginal interests significantly outweigh third-party rights and interests, the Crown revoke the common law tenure or the civil law dismemberment of ownership or personal right of enjoyment at fair market value on behalf of the Aboriginal party to convert it into Category I lands. Examples of when this would be justified are where

(a) a successful claim for the land might have been made under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past); or

(b) the land is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site or a place of substantial cultural significance.

**2.4.20**

Lands affected at common law by interests less than fee simple or under the civil law by rights of enjoyment other than ownership can be selected as Category II lands.

*Parks and protected areas*

There are many parks and protected areas within the traditional territories of Aboriginal nations. For example, Canada has recently returned to the Keeseekoowenin Ojibway Nation in Manitoba a small portion of Riding Mountain National Park that was wrongfully taken from them in the 1930s. In the Yukon and Nunavut agreements, several new national parks have been created with the full consent, and indeed at the insistence, of the Aboriginal parties. These new parks will be subject to shared management. Moreover, some Aboriginal nations might wish to establish their own tribal parks — as the Haida people of British Columbia did with Gwaii Haanas (South Moresby) — and most will want to share in the management of existing and future parks and protected areas. Nonetheless, existing parks and protected areas should be interfered with as little as possible in the land selection process.

**Recommendations**

The Commission recommends that

**2.4.21**

Existing parks and protected areas not be selected as Category I lands, except in exceptional cases where the Aboriginal nation's interests clearly outweigh the Crown's interests in a specific parcel. Examples of when this would be justified are where

(a) a successful claim for all or part of the park or protected area might have been made under the existing specific claims policy (such as reserve lands unlawfully or fraudulently surrendered in the past);

(b) all or part of the park or protected area is of outstanding traditional significance to the Aboriginal party (such as an Aboriginal cemetery or spiritual site); or

(c) a park occupies a substantial portion of a nation's territory.

**2.4.22**

Existing parks and protected areas, as well as lands being considered for protected area or park status, may be selected as Category II lands.

*Public interests on Crown land*

Members of the public use Crown lands and waters for a variety of purposes, including recreation, and hunting and fishing. Parties to the treaty process must be free to categorize Crown lands to which the public has access as Category I or II lands. Some Crown lands used for these purposes undoubtedly will be selected in the course of treaty negotiations and converted into Category I lands. Aboriginal governments may choose to allow continued public access to these lands, but they will have legislative authority to regulate such activities subject to any terms in the agreement to the contrary. In many cases, such activities will be of economic benefit to Aboriginal communities. In the case of sacred sites or places of traditional significance, however, Aboriginal governments may wish to exclude members of the general society. If parties categorize such lands as Category II lands, public rights of access will be determined by the co-jurisdictional and co-management bodies empowered to manage the lands and direct and control development and use. In Category III lands, rights of access will continue to be determined by the federal, provincial, territorial or municipal government with jurisdiction over the lands in question.

**Recommendation**

The Commission recommends that

**2.4.23**

Crown lands to which the public has access be available for selection as Category I or II lands.

Interim relief agreements

Treaty negotiations based on mutual recognition, mutual respect, sharing and mutual responsibility will take time. In the past, it has taken a decade or more to conclude a comprehensive claims agreement. We have every reason to think that the time involved may be reduced by the greater and more formal government commitment in the proposed royal proclamation as well as the clearer direction and greater consensus on the purposes of treaty negotiations. Nonetheless, time will be required to complete large-scale negotiations on a new relationship, whether it is the making of a new treaty or the renewal and implementation of an historical one. For this reason, the Commission considers it vital that realistic and effective interim relief be agreed upon as a first step in treaty negotiations to protect Aboriginal rights concerning lands and resources. Forms of relief should be contained in interim agreements between federal, provincial, territorial and Aboriginal governments. These should provide an effective means of interim protection from development and the creation of new legal third-party interests by subjecting them to a set of controls and exclusions. Relief should apply for a specified period until agreement on a formal treaty is reached or until joint management structures are put in place after the ratification of a treaty.

As the brief from the Labrador Inuit Association points out, the existence of interim relief agreements can have powerful implications for the process of claim negotiations:

• they increase the pressure on non-Aboriginal governments to negotiate in good faith and expeditiously;

• they help equalize the bargaining power of the Aboriginal claimant group;

• they give the Aboriginal group a say in managing lands and resources in their

traditional territory during negotiations; and

• they free up time and resources, which the Aboriginal group might otherwise have devoted to dealing with resource developments on their lands.[373]

As other presenters pointed out, the chief problem in the absence of an agreement on interim relief is that as the negotiations proceed, new third-party rights and interests are granted and even promoted by one party to the negotiations, to the detriment of the negotiating position, and indeed the substance of the interest, of the other party.[374] Moreover, as we have seen, the courts are reluctant to order interim relief to protect Aboriginal title pending final judgement.

We propose that federal policy and the Canada-wide framework agreement recognize, as a matter of principle, that nation-to-nation negotiations must begin with efforts to reach an agreement that includes interim relief of the following nature:

• Interim relief agreements should provide for land withdrawals to halt the further disposition of rights on specified lands for the duration of the agreement. Land withdrawals should apply to those areas most likely to be selected by the Aboriginal party and that might affect the disposition of all or a significant portion of existing or future rights concerning lands and resources.

• Aboriginal participation and consent should be required for the creation of new third-party interests or Crown development of lands or resources on withdrawn lands. An interim relief agreement should also guarantee Aboriginal participation in the joint management of lands and resources in the traditional territory, for the duration of the agreement. This involvement could take various forms, ranging from consultation to consent to all surface and subsurface rights issuance.

• Interim relief agreements should provide that revenue to governments, such as taxes and royalties from any new resources development on the traditional territory, should be held in trust pending final resolution of the claim. While such revenues would be payable by the developer, governments would not receive them pending expiry of the interim relief agreement.

Given that one of the purposes of an interim relief agreement is to protect the rights of Aboriginal peoples to lands and resources, undue delay in negotiating

such an agreement could be highly detrimental. Companion legislation to a royal proclamation should state that the parties to negotiation have a duty to bargain in good faith and make reasonable efforts to reach an agreement. We propose that the Aboriginal Lands and Treaties Tribunal be given jurisdiction over the negotiation, implementation and conclusion of interim relief agreements to ensure good faith negotiations, and in the event of failure, be empowered to impose an agreement in order to prevent the erosion of Aboriginal title. These recommendations require provincial participation in negotiations and in the design of the tribunal and its mandate.

**Recommendations**

The Commission recommends that

**2.4.24**

Federal and provincial governments recognize, in the Canada-wide framework agreement, the critical role of interim relief agreements and agree on principles and procedures to govern these agreements, providing for

(a) the partial withdrawal of lands that are the subject of claims in a specific claims treaty process;

(b) Aboriginal participation and consent in the use or development of withdrawn lands; and

(c) revenues from royalties or taxation of resource developments on the withdrawn lands to be held in trust pending the outcome of the negotiation.

**2.4.25**

In relation to treaties, the companion legislation to the proposed royal proclamation state that the parties have a duty to make reasonable efforts to reach an interim relief agreement.

***Rights concerning lands and resources and the role of provincial governments***

Although Parliament has exclusive legislative authority to enact laws in relation to “Indians, and Lands reserved for the Indians”, provincial interests in lands

and resources figure prominently in our proposals. Undoubtedly, provincial Crown lands and resources will be a matter of discussion in any negotiations. Many specific claims about the loss of land guaranteed to an Aboriginal nation by treaty implicate provincial interests, for the land in question is often provincial Crown land. Many times the federal government offers only cash in compensation for land claims, while the lands remain with the province. There must be a presumption in respect of historical treaties that Aboriginal signatories did not intend to consent to the blanket extinguishment of their Aboriginal rights and title by agreeing to a treaty relationship. It must be presumed also that where the text of an historical treaty makes reference to a blanket or wholesale cession of lands, the treaty relationship mandates a sharing of both the territory and the right to govern and manage it, as opposed to a cession of the territory to the Crown.

It is critical that provincial governments establish policies parallel to the processes and reforms that we are proposing, and that provincial governments participate fully in negotiations on interim relief agreements and in the treaty-making and treaty implementation and renewal processes. In addition, to provide Aboriginal nations with sufficient land to foster economic self-reliance and cultural and political autonomy, provincial governments must make Crown land available to an Aboriginal nation in cases where traditional territory has become provincial Crown land as the result of a breach of Crown duty. The provision of land in such circumstances is a matter of simple justice and likely is required by principles of fiduciary law.[375] Where traditional territory has become private land as a result of Crown conduct (such as the improper sale or surrender of reserve land), the federal government can be called upon to compensate the province for the market value of Crown lands provided to Aboriginal nations in substitution, but such issues should be resolved between the governments and should not delay the resolution of claims.

In the wake of extensive litigation between Canada and provincial governments between the 1880s and the early 1920s, various federal-provincial statutory agreements were entered into that had the effect of giving provincial governments a measure of control over reserve lands and certain resources revenues from such lands. In the short term, these arrangements must be renegotiated by the federal and provincial governments to restore the control and benefits of reserve lands to Aboriginal nations. In the longer term, they should be repealed and replaced with appropriate statutory agreements that formalize the obligations of the federal and provincial governments in the fulfilment of treaty provisions.

**Recommendations**

The Commission recommends that

**2.4.26**

Provincial governments establish policies parallel to the processes and reforms proposed in recommendations 2.4.1 to 2.4.22.

**2.4.27**

Provincial governments participate fully in the treaty-making and treaty implementation and renewal processes and in negotiations on interim relief agreements.

**2.4.28**

In addition to provisions made available under recommendations 2.4.2 to 2.4.5, provincial governments make Crown land available to an Aboriginal nation where traditional Aboriginal territory became provincial Crown land as the result of a breach of Crown duty.

## 6.4 An Aboriginal Lands and Treaties Tribunal

Our principles for a renewed relationship between Aboriginal and non-Aboriginal peoples are not self-implementing. If these principles are to retain their credibility and vitality, they must be translated expeditiously into solid achievements. To prevent the erosion of confidence in the foundations of the new relationship, and to build their own legitimacy, institutional arrangements must satisfy four principles.

First, the tasks must be appropriate for the body to which they are assigned. This is the principle of institutional competence. It means, for example, that multi-dimensional and complex public policy decisions of wide-ranging importance should be made through a political process by persons accountable to those they represent, not by an adjudicative body independent of the parties. On the other hand, the resolution of disputes with less sweeping ramifications, depending more on judgements about the specifics of particular issues, can appropriately be entrusted to a body that is, and is seen to be, informed, open, impartial and independent.

Second, before the body is established, its design, jurisdiction, procedures and powers must have been the subject of wide consultation and broad agreement. Its composition must be representative of those most affected by the issues to be decided. This is the principle of inclusiveness.

Third, the powers and procedures of the body must be compatible with a process that is participatory, informal and inexpensive. This is the principle of accessibility. An adversarial model dominated by lawyers, in which the decision-making body plays an essentially passive role, is unlikely to meet these objectives. For these reasons, the body must have the capacity to deal comprehensively with the issues before it, and its decisions should be final, subject only to limited rights of reconsideration and judicial review.

Fourth, any body entrusted with responsibilities related to implementing the Commission's recommendations for a renewed relationship between Aboriginal and non-Aboriginal people must have available the ingredients for fully informed, thoughtful and wise decisions. These can be supplied through representations made at public hearings, the expertise and knowledge of its members, staff and consultants, and the results of research. This is the principle of responsive deliberation.

With these principles in mind, we propose that federal companion legislation to the royal proclamation provide for the establishment of an independent administrative tribunal, the Aboriginal Lands and Treaties Tribunal. One of its principal roles will be to ensure a just resolution of existing specific claims, relating mostly, but not exclusively, to lands and resources. The tribunal will have responsibility not only for monitoring the fairness of the bargaining process by which most specific claims should be settled, but also, where no agreement is reached, for adjudicating outstanding substantive issues and making final and binding decisions on the merits of these claims.

In addition, the tribunal may be of assistance in treaty-making, implementation and renewal processes. However, because of the highly political nature of these negotiations, the tribunal's role will be much more modest and confined almost exclusively to process issues and matters pertaining to interim relief. The tribunal would also be assigned responsibility for the creation and supervision of recognition panels to advise the government on the eligibility of an Aboriginal nation's application for recognition (outlined in Chapter 3).

**Recommendation**

The Commission recommends that

**2.4.29**

Federal companion legislation to the royal proclamation provide for the establishment of an independent administrative tribunal, to be called the Aboriginal Lands and Treaties Tribunal.

***Rationale for a tribunal***

Experience clearly indicates that without an enforcement mechanism, it is all too likely that disputes will continue to be protracted as a result of the reluctance of the federal or provincial governments to come to the bargaining table or, when there, to attempt in good faith to reach a speedy and just resolution of the issues. It seems equally clear that a body with the power only to make recommendations is of limited value in effecting settlements.

While Aboriginal people have undoubtedly achieved some important victories in the recognition of Aboriginal title and other rights through the courts, litigation is a very slow and expensive process for resolving the large number of outstanding claims, let alone the disputes that may arise from implementation of the Commission's recommendations. Although satisfying the criterion of independence, judges lack the necessary expertise in these areas. In addition, the adversarial and formal procedures of courts of law are all too likely to be damaging to the relationship of the parties, and their domination by lawyers tends to exclude the active participation of the parties themselves. Moreover, court procedures and rules of evidence can often be quite inappropriate for achieving a just and fully informed resolution of the issues.

Independent administrative agencies are perhaps the most characteristic public institutions of the late twentieth century. They have several features in common: procedural openness, specialization of functions, and a degree of independence from the executive branch of government. In other respects, they are notable for the variety of their structures, powers, procedures and composition. It is, of course, this very flexibility that has made them so attractive in many different government contexts: within broad parameters, the institutional design and legal powers of these agencies can be tailored to the exigencies of the task at hand.

Thus, the composition of a tribunal is not limited to lawyers but can include

persons with a range of experience, knowledge and skills. Specialization ensures that, in addition to their previous knowledge, its members will acquire new expertise and understanding as a result of repeated exposure to related issues. It is also possible to ensure that tribunal members and staff are representative of those they serve.

Tribunals do not have to use formal, adversarial procedures. For example, many tribunals have a research capacity independent of the parties that enables them to play an active role in defining and resolving the issues. They are not restricted by technical rules of evidence either. At the same time, the openness and independence inherent in administrative tribunals provide essential supports for the legitimacy that is crucial for successful decision making in sensitive and complex areas of public policy.

These features make an independent administrative tribunal the most suitable institutional form through which to exercise whatever coercive powers of a broadly judicial type are needed to implement the Commission's recommendations.

***Jurisdiction of the tribunal***

Our proposals for the tribunal's jurisdiction should be considered with three points in mind. First, since constitutional competence for "Indians, and Lands reserved for the Indians" is vested in Parliament, the tribunal should be established by federal legislation. The jurisdiction proposed for the tribunal with respect to specific claims can be conferred by federal legislation. Whether they arise from a treaty, the common law of Aboriginal title or some other liability of the federal Crown, specific claims can be settled by a body operating under federal statute.

Nonetheless, provinces will be directly interested in the resolution of many of these claims, especially when they relate to land to which underlying title is held by the Crown in right of a province. It is highly desirable, therefore, that provinces become involved in the design of the tribunal. In addition, it would enhance the tribunal's constitutional ability to deal effectively with issues relating to land and self-governance if provincial legislatures were to delegate to the tribunal jurisdiction over matters that relate essentially to property and civil rights in the province. The constitutional dimensions of the tribunal's jurisdiction are discussed in more detail below.

Second, at this stage it is neither realistic nor desirable to provide more than a

tentative sketch of the institutional design and operation of the tribunal. If the tribunal is to be broadly accepted and effective, Aboriginal people and federal and provincial governments must be actively involved in its design. Moreover, given the complexity and variety of the issues that are likely to arise, it would be unwise to attempt to settle the details of the tribunal's operations so precisely as to preclude the possibility of readily making adjustments in the light of experience.

Third, negotiation is the best way for Aboriginal nations and the other two orders of government to resolve their differences. This will be especially true concerning the treaty-making, implementation and renewal processes as they relate to claims for lands and resources and the right of self-governance. However, it is hoped that conferring jurisdiction on the tribunal to adjudicate specific claims will provide an important incentive for the parties to negotiate. Despite its adjudicative powers over specific claims, the tribunal's roles are best regarded an aid, not a substitute, for negotiation.

**Recommendations**

The Commission recommends that

**2.4.30**

Parliament, and provincial legislatures when they are ready, confer on the tribunal the necessary authority to enable it to discharge its statutory mandate pertaining to both federal and provincial spheres of jurisdiction.

**2.4.31**

Even without provincial delegation of powers to the tribunal, Parliament confer on the tribunal jurisdiction to the full extent of federal constitutional competence in respect of "Indians, and Lands reserved for the Indians", including the power to issue orders binding provincial governments and others, when they relate essentially to this head of federal competence.

Specific claims

The creation of an administrative body with binding decision-making powers over specific claims was first proposed by the federal government more than three decades ago but never implemented. The subsequent failure of the

federal government to settle specific land claims, partly because of the lack of an independent body, resulted in Aboriginal people feeling a sense of grievous injustice.

In defining the jurisdiction of the tribunal we have adopted an understanding of specific claims considerably broader than that currently accepted by government policy. For one thing, the jurisdiction proposed for the tribunal extends to specific claims made by any of the Aboriginal peoples covered by section 91(24) of the *Constitution Act, 1867*: Indian, Inuit or Métis. This is consistent with the position taken by the Commission that section 91(24) includes Métis people and their lands (see Volume 4, Chapter 5).

Specific claims relating to land may arise from several legal sources. Some claims will be based on allegations of failure by the Crown to honour an existing treaty obligation. Others might involve disputes about lands reserved by the Crown; for example, part of the reserve might have been improperly expropriated, or there might be disagreement about the precise boundaries of the reserve. Still others might depend on unextinguished Aboriginal title to particular land or the Crown's breach of the *Indian Act* or a fiduciary duty. An example of a Métis specific claim is the allegation by the western Métis Nation that the Crown is in breach of its fiduciary duty in failing to prevent the perpetration of fraud and other forms of dishonesty by third parties and government officials with respect to land title.

Specific claims might pertain also to natural resources, such as mineral rights and hunting, fishing and trapping rights on particular land. Nor should the specific claims within the tribunal's jurisdiction be limited to lands and resources — they might also include specific provisions in a treaty relating to the payment of an annuity by the Crown, education, health or taxation, for example.

Current federal policy on specific claims adopts a much narrower definition of a specific claim than that just indicated. Nonetheless, even narrowly understood, more than 500 of the specific claims already submitted remain unresolved and are being settled at the rate of a mere five or six each year. Moreover, the process now in place gives the appearance of injustice. In particular, since claims are currently referred to the Indian Claims Commission only after they have been screened by officials in the department of justice, and since the claims commission has the power to make recommendations but not final decisions, the federal government appears to be in the position of both judge and adversary.

We attach utmost importance to the just and expeditious settlement of specific claims, more broadly conceived, and we see some of the tribunal's most important functions being in this area. We recommend that the tribunal replace the claims commission, although the experience gained by members of the commission concerning specific claims should be made available to the tribunal by, for example, the appointment to the tribunal of former members of the commission.

*The tribunal and the negotiating process*

Regardless of their particular subject matter, negotiations are likely to produce timely, just and durable agreements only if the negotiating process is not allowed to stall and is regarded by the participants as fair. Complaints about the unwillingness of governments to bargain in good faith and the disparity of resources available to the parties are long-standing.

We proposed the creation of treaty commissions to facilitate negotiations including mediation when required. Most of the commissions' efforts will focus on the bilateral process for negotiating new or renewed treaties, which may include claims arising from existing treaties, comprehensive land claims and self-governance.

It will be an important function of the Aboriginal Lands and Treaties Tribunal to ensure that any negotiations on specific claims outside bilateral treaty processes are conducted in good faith and without undue delay and that the integrity of the process is otherwise maintained. Rather like a labour relations board, the tribunal will police the bargaining process, and, unlike the treaties commissions, it will have the power to make binding orders on those in breach.

In addition, when it proves impossible through good faith negotiations with the federal government for Aboriginal people to secure adequate funding to enable them to participate effectively in the process for resolving a particular claim, it should be within the jurisdiction of the tribunal to review the adequacy of the amount of funding provided by the federal government.

There is, of course, a danger that disappointment with funding decisions, even if made by members who do not participate in subsequent proceedings arising from the same negotiations, may undermine the credibility and perceived impartiality of the tribunal to determine the other issues. Indeed, we invited a person who was independent of our Commission to chair the Intervener Participation Program through which funds were distributed to Aboriginal

groups to enable them to participate in the Commission's work by preparing research papers, briefs and oral presentations.

On the other hand, the joint boards established under land use, municipal and environmental legislation, to which Ontario's *Intervenor Funding Project Act* applies, seem not to have been impaired by their power to award funding before hearings commence.[376] Some of the criteria contained in the Ontario statute to guide the boards' discretionary award of funding might be relevant to decisions the tribunal will make in exercising its funding review powers.

Perhaps the most salutary warning to emerge from Ontario's experience with intervener funding is the propensity of lawyers to turn the hearings process into something resembling complex, multi-party litigation in the courts. However, the active role recommended for the tribunal in the exercise of its adjudicative powers should provide an effective countervail.

*Substantive questions*

Here we sketch the tribunal's decision-making powers in respect of specific claims that the parties have been unable to resolve in negotiations outside the treaty processes, even with the benefit of mediation and other assistance provided by treaty commissions. We anticipate that most claims will be settled informally by negotiation. Indeed, the existence of the tribunal, as a last resort when good-faith attempts to resolve differences have failed, will tend to encourage the parties to reach an agreement.

Given the relatively limited scope of most specific claims arising from the failure of the Crown to implement the rights and obligations in existing treaties, or derogations of reserved land, for example, it would be appropriate for Parliament to confer on the tribunal jurisdiction to adjudicate disputes that the parties cannot resolve by negotiation. The tribunal may be asked to adjudicate the claim as a whole, or any part of it. In addition, the statute should confer wide remedial powers on the tribunal, making it clear that the transfer of land, as opposed to compensation, is the preferred remedy.

Because these claims are based on breaches of obligation by the federal Crown, it is within Parliament's constitutional competence for "Indians, and Lands reserved for the Indians" to confer on the tribunal statutory jurisdiction to determine whether a breach has occurred and, if so, to provide an appropriate remedy. Federal law creating the tribunal might authorize the making of an order, even though it affects the proprietary rights of the Crown in right of a

province, if the law in question relates in pith and substance to “Indians, and Lands reserved for the Indians”. However, legitimate provincial interests will have to be recognized. After the tribunal has been created and principles for the selection of land determined, parallel negotiations are likely to take place between the province affected and the federal government on issues such as the selection of the land to be transferred and the compensation to be paid for the transfer.

Aboriginal nations should not have to wait for resolution of these pressing specific claims by the treaty renewal processes. It is a widespread and strongly held view among Aboriginal people that, as a matter of the most elementary justice, the Crown’s non-fulfilment of existing treaty and other obligations with respect to specific claims should be remedied without further delay. The tribunal’s decision on any specific claim will be final. However, an Aboriginal nation, or other claimants, should be free to refer a specific claim instead to the longer and broader treaty-making or renewal processes.

Because there is no bright conceptual line dividing specific claims from comprehensive claims, legislation will need to define with care the term ‘specific claim’. This definition should include all disputes categorized by current federal policy as either specific claims or claims of a third kind. In general, the definition should embrace claims relating to treaty rights and obligations, as well as claims based on breach of statutory, fiduciary or other legal obligations of the Crown. It should seek to be inclusive, not exclusive, of the range of disputes that typically arise between the Crown and Aboriginal parties to treaties. In any event, the definition of a specific claim should certainly include any issue relating to treaties that is currently justiciable in the courts. It will be for the tribunal to decide, subject to the possibility of judicial review, whether a claim referred to it falls within its jurisdiction as defined in its enabling statute.

The enabling legislation must also provide that, when deciding specific claims derived from treaties or issues relating to treaty making or implementation, the tribunal should adopt a broad and progressive interpretation of the treaties and not limit itself to technical rules of evidence (including the parol evidence rule) by which the courts are bound. In particular, the enabling legislation must ensure that when interpreting disputed terms and fashioning appropriate relief for breach, the tribunal takes into account the fiduciary obligations of the Crown, Aboriginal customary law and perspectives, and the relevant history of the parties’ conduct and relations. Moreover, the statute should remind the tribunal of the importance of rendering its decisions promptly. Aboriginal

peoples have good reason already to appreciate the truth of the maxim that justice delayed is justice denied.

Clearing the current substantial backlog of specific claims referred to the tribunal will require a time limit. In contrast, the longer-term processes of treaty making and renewal, tackling the more deep-seated problems, will be of indefinite duration. Given its role in the longer-term treaty processes, the tribunal will remain in existence for that time.

An important policy question is whether claims should be made to the tribunal solely at the instance of the Aboriginal claimants, or whether the consent of the Crown should be required, including the Crown in right of the province, when the dispute involves land to which it has the underlying title. On balance, we recommend that the Crown not be given the power to veto the right of claimants to refer such questions to binding decisions by the tribunal. To make the tribunal's jurisdiction contingent on the consent of all parties would provide a major disincentive for government to settle these claims, many of which have been outstanding for a very long time.

When claimants refer a claim to the tribunal for settlement, the tribunal could grant standing to any third party whose interests are directly affected by the decision. We have in mind those on whom the claim, if successful, would have a direct impact: local landowners, including municipalities, and local fishers, for example.

Finally, when a specific claim arises under a treaty that contains its own mechanism for resolving disputes about non-implementation, the claim should be handled through the agreed process. However, if a claim raises issues of general significance, extending beyond the immediate dispute, the Aboriginal nation should be able to ask the tribunal to resolve it. If the non-Aboriginal party objects to the tribunal's jurisdiction over a claim, on the ground that it should have been referred to the treaty mechanism, the tribunal will have to decide whether, given the circumstances, there is good reason for bypassing the primary forum. Conversely, those responsible under the treaty for resolving disputes may, in exceptional circumstances, decide that the claim is better taken to the tribunal. Once either the tribunal or the decision-making body created by the treaty has decided to deal with the claim, the other should defer to it and refuse to entertain the claim.

The general thrust of the legislative scheme we propose for the tribunal is to expand the choices available to Aboriginal people for achieving justice.

Potential inconsistencies between specific dispute resolution mechanisms in particular treaties and the tribunal's design are a price worth paying to maintain this principle.

Treaty-making, implementation and renewal processes

In describing the jurisdiction that should be conferred on the tribunal with respect to comprehensive claims, we deal separately with land claims and self-governance, although often the issues will be inextricably linked.

*Land claims*

The tribunal should not exercise a significant role on non-process issues that might arise in the course of treaty-making and treaty implementation and renewal negotiations between the Crown and Aboriginal nations, including Métis people and Inuit. For the most part, issues arising out of these processes will be unsuitable for adjudication. They will usually involve the reallocation of lands, resources and jurisdictional authority and can be addressed satisfactorily only as an integral part of the whole relationship established (or to be established) by the treaty.

The tribunal would be available to review the adequacy of funding made available by government to Aboriginal parties. It would also ensure that negotiations were conducted in good faith. However, in the absence of provincial legislation delegating powers to the tribunal in respect of matters that relate essentially to property and civil rights, it is unlikely that the tribunal could rely on jurisdiction conferred solely by federal legislation to order a province to the bargaining table. The courts might conclude that Parliament's constitutional competence with regard to Indian peoples and their lands does not extend to aspects of the bilateral treaty process involving land to which a province has underlying title and on which there may be no existing Aboriginal title. However, it might concur with our view, set out in Chapter 2, that the assumed extinguishment of Aboriginal title as a result of the historical treaties may not in fact have occurred and that Aboriginal title can continue to exist alongside provincial Crown title.

In addition, the parties mutually should be able to refer to the tribunal any issue on which they cannot agree. Arbitration might enable them to obtain a ruling on an issue that is impeding resolution of the central questions they are negotiating. Party autonomy should be the governing principle: that is, generally they are in the best position to know when the assistance of the

tribunal on a matter that is not just one of process would be beneficial. The tribunal should have the power to make a final adjudication and to issue orders that are legally binding on the parties.

However, the tribunal should have discretion not to exercise its jurisdiction as well. For example, if it regards a question referred to it as one better resolved by the parties themselves, it could send it back for further negotiation, perhaps with some suggestions for a way forward. It might regard a question as premature, and again might send it back to the parties, with or without suggestions.

Finally, in some circumstances the parties might leave a question of principle about the interpretation of existing treaty rights or unextinguished Aboriginal title unresolved, while they negotiate other issues. In these situations, which we anticipate will be few, we propose that if the government refuses to submit a particular matter to the tribunal for arbitration, the Aboriginal party should be able to refer it for binding adjudication on its own initiative. We want to emphasize that this jurisdiction would extend only to issues of Aboriginal rights or treaty that would be justiciable in a court of law, if the claimants had chosen that route.

*Implementing the right of self-government*

It is unlikely that substantive issues surrounding negotiations on the implementation of self-governance will be suitable for adjudication by the tribunal. Negotiating the recognition of constitutional powers among the federal, provincial and Aboriginal orders of government, together with the transfer of a land and resource base sufficient to sustain Aboriginal self-governance, involves political questions of the highest order. However, subject to any constitutional limits when a province has not delegated powers to the tribunal, its jurisdiction to monitor the negotiating process should be applicable here, as should its authority to arbitrate an issue referred to it by the parties.

Nonetheless, in addition to its roles as monitor of the negotiation process and consensual arbitrator, the tribunal appropriately can assume jurisdiction for resolving disputes about whether an Aboriginal group should be recognized as an Aboriginal nation possessing the right of self-government. The Commission has recommended that criteria of recognition, including culture and language, be included in the legislation. Panels organized by the tribunal specifically for this purpose should be empowered to recommend whether a group claiming nationhood status should be recognized as such by the federal government. In

the event that a panel's recommendation for recognition is rejected by the federal government on the grounds that a particular group's inherent right of self-government had been extinguished or had never existed, the Aboriginal party could refer the matter to the tribunal proper for adjudication.

Compliance

Parties to a new treaty or agreement could empower the tribunal to resolve disputes about compliance in an area within the tribunal's jurisdiction. Parties to existing treaties may also decide to include a similar provision in respect of disputes not already covered by the tribunal's general statutory jurisdiction. Accordingly, a party alleging that an agreement is not being implemented in accordance with its intent should be able to invoke the tribunal's assistance. The tribunal would be given the statutory powers necessary to investigate a complaint of non-compliance, adjudicate the dispute and award an appropriate remedy.

Parties to a new treaty would be able to devise their own dispute resolution mechanism; however, the existence of the tribunal, with a developed structure, expertise and statutory powers, may provide an attractive and convenient alternative.

Interim relief

To maintain the fairness and efficacy of the processes for resolving disputes concerning lands and resources, it is crucial to ensure that their subject matter is not lost or irretrievably diminished before negotiations are complete or disputes resolved by adjudication. We proposed that parties be under an obligation to bargain in good faith and make every reasonable effort to reach interim relief agreements to halt or regulate the development of lands and resources and to provide for their

continuing management. The tribunal should have jurisdiction to supervise the negotiation, implementation and conclusion of interim relief agreements to ensure good faith treaty-making and treaty implementation and renewal negotiations; also, it should be empowered to impose an interim relief agreement in the event of a breach of the duty to bargain, as well as to order other forms of interim relief where necessary.

The tribunal would be a suitable body to make orders granting interim relief with respect to lands and resources that are the subject of negotiation, once it was

satisfied that the claimants had demonstrated an arguable claim. The availability of effective relief of this nature should remove a powerful incentive for governments to procrastinate in the conduct of negotiations and delay the just settlement of claims.

However, to bind the provinces to an interim relief order, it is likely that the tribunal will require provincial legislatures to delegate powers to supplement its own. This is because, when the relief proposed by the tribunal concerns land owned by the Crown in right of the province that is not necessarily subject to existing Aboriginal title, the essence of the order may well be regarded by the courts as pertaining to property and civil rights within the province rather than to Aboriginal peoples and their lands.

Because of the generally circumscribed scope of specific land claims, there will be fewer occasions on which it will be appropriate for the tribunal to exercise its power to order interim relief. However, when the nature of the claim is such that its substratum may disappear, the tribunal should be empowered to award interim relief here as well.

**Recommendations**

The Commission recommends that

**2.4.32**

The tribunal be established by federal statute operative in two areas:

(a) settlement of specific claims, including those removed by the Aboriginal party from the broader treaty-making, implementation and renewal processes; and

(b) treaty-making, implementation and renewal processes.

**2.4.33**

In respect of specific claims, the tribunal's jurisdiction include

(a) reviewing the adequacy of federal funding provided to claimants;

(b) monitoring the good faith of the bargaining process and making binding

orders on those in breach; and

(c) adjudicating claims, or parts of claims, referred to it by Aboriginal claimants and providing an appropriate remedy where called for.

**2.4.34**

In respect of the longer-term treaty-making, implementation and renewal processes, the tribunal's jurisdiction include

(a) reviewing the adequacy of federal funding to Aboriginal parties;

(b) supervising the negotiation, implementation, and conclusion of interim relief agreements, imposing interim relief agreements in the event of a breach of the duty to bargain in good faith, and granting interim relief pending successful negotiations of a new or renewed treaty, with respect to federal lands and on provincial lands where provincial powers have been so delegated;

(c) arbitrating any issues referred to it by the parties by mutual consent;

(d) monitoring the good faith of the bargaining process;

(e) adjudicating, on request of an Aboriginal party, questions of any Aboriginal or treaty rights that are related to the negotiations and justiciable in a court of law;

(f) investigating a complaint of non-compliance with a treaty undertaking, adjudicating the dispute and awarding an appropriate remedy when so empowered by the treaty parties; and

(g) recommending to the federal government, through panels established for the purpose, whether a group asserting the right of self-governance should be recognized as an Aboriginal nation.

**2.4.35**

The enabling legislation direct the tribunal to adopt a broad and progressive interpretation of the treaties, not limiting itself to technical rules of evidence, and to take into account the fiduciary obligations of the Crown, Aboriginal customary and property law, and the relevant history of the parties' relations.

**2.4.36**

### *Constitutional foundations*

A tribunal that is to make binding determinations of rights and duties and issue orders backed by the authority of the state requires statutory authority. In a federal system, it is important to establish which order of government has the constitutional authority to give the tribunal a legislative mandate.

The Commission's strong preference is that the provinces co-operate actively with the federal government and Aboriginal people in working to ensure the success of the tribunal as an instrument of justice. In particular, we would hope that the provinces are willing to delegate to the tribunal the powers necessary to enable it to grant interim relief and monitor negotiations effectively. However, the legislative powers of Parliament are sufficient to enable the tribunal to deal effectively with one important part of its mandate, the resolution of specific claims, especially those relating to land.

### *A federal tribunal with additional powers delegated by the provinces*

The tribunal's principal work will be in connection with the settlement of specific claims based on existing treaties that have not been honoured or on other legal sources, such as the Crown's reserve of land for Aboriginal people. We regard specific claims against the Crown, whatever their origin, as falling squarely within the exclusive federal legislative competence for "Indians, and Lands reserved for the Indians", even when they relate to land to which a province holds the underlying title. In view of the constitutional authority vested in Parliament, it is appropriate that, after extensive consultations with Aboriginal people and the provinces, the tribunal should be established by federal statute. This would have the advantage of minimizing the risk of a successful challenge to the tribunal under section 96 of the *Constitution Act, 1867.*

It is clear, however, that the provinces will have a direct interest in the settlement of many of the issues outstanding between Aboriginal people and the Crown. The successful conclusion of the larger treaty-making, renewal and implementation processes is likely to require the provinces to delegate the necessary powers to the tribunal to enable it to support negotiations and grant interim relief.

In addition, provinces must confirm the legislative powers needed by the third

order of government to implement Aboriginal self-governance. Even when provincial co-operation in the resolution of a dispute is not required as a matter of constitutional law (as in the settlement of specific land claims, for example), the outcome may be of concern to a province. In short, the provinces are crucially important actors in the process of renewing the relationship between Aboriginal peoples and Canada.

Active participation by the provinces in implementing the Commission's recommendations would recognize their stake in the success of the enterprise. A constructive step in this direction would be for the provinces to delegate to the tribunal the power to deal with any matters within its mandate that fall outside exclusive federal legislative competence. This would maximize the tribunal's capacity to deal with issues comprehensively and conclusively. That the constitution permits the inter-delegation of power by the legislature of one order of government to an administrative agency created by the other order of government has been made clear by the Supreme Court in *P.E.I. Potato Marketing Board* v. *Willis*.[377]

Once the tribunal has been created by Parliament, provinces could 'sign on' individually and at different times by enacting legislation to delegate to the tribunal the power it would need to perform its functions effectively. Provinces that signed on would become active participants in the process of renewing the relationship between Aboriginal people and other residents within their boundaries. For example, they would be included in consultations about the development and operation of the tribunal and would be invited to nominate members to the tribunal.

A federal tribunal with exclusively federal powers

It is clearly preferable for the tribunal to operate with the benefit of co-operation between governments. However, Parliament has the constitutional capacity to confer on the tribunal the statutory authority necessary to enable it to discharge the most important parts of the mandate we have recommended be entrusted to it. In this section, we indicate the breadth of Parliament's authority to legislate in this area.

The authority conferred by section 91(24) of the *Constitution Act, 1867* enables Parliament to enact legislation establishing a tribunal with jurisdiction over a range of issues arising from Aboriginal treaties, land claims and self-governance. A tribunal could be given statutory decision-making powers on any matters falling within section 91(24). In addition, the law relating to the liability

of the Crown in right of Canada is federal, whether or not it has been put into statutory form, as is the common law relating to Aboriginal title.

Section 101 of the *Constitution Act, 1867* provides another possible source of authority. It authorizes Parliament to establish “additional courts for the better administration of the laws of Canada”. Under this provision, Parliament can create a court to decide disputes governed by federal legislation, as well as by federal common law relating to Aboriginal title and the liability of the federal Crown.

Despite Parliament’s broad powers under these provisions, the Crown in right of the provinces holds the underlying title to much of the land that is subject to claims of unextinguished Aboriginal title and to specific claims under existing treaties. Three provisions of the *Constitution Act*, *1867* give provincial legislatures exclusive authority to legislate with respect to such land. Section 92(5) confers legislative competence over the sale and management of public lands belonging to the province, while section 92(13) assigns to provincial jurisdiction property and civil rights within the province. A third important source of provincial authority is section 92A of the *Constitution Act, 1867*, which gives provinces exclusive legislative authority over non-renewable resources, forestry resources and electrical energy.

A tribunal with powers conferred solely by federal law could not exercise jurisdiction in matters that, in pith and substance, fall within one of these provincial heads of power rather than within the federal sphere of “Indians, and Lands reserved for the Indians”. When the first provinces entered Confederation, however, the land that passed to them then was “subject to any Trusts existing in respect thereof, and to any interest other than that of the province in the same”. Similar provisions apply to provinces admitted to Confederation later.

Despite the limitations on federal legislative competence that preclude Parliament from conferring plenary powers on the tribunal in every aspect of its statutory mandate, it is equally important to note the substantial scope of the jurisdiction that federal statute can confer. By virtue of the paramountcy doctrine, federal legislation relating in pith and substance to “Indians, and Lands reserved for the Indians” prevails over any inconsistent provincial statutes or common law. In addition, a federal law that in other respects falls within the constitutional authority of Parliament can be made to apply to the Crown in right of the provinces, if clearly it so provides. Canada’s constitutional law contains no general doctrine of intergovernmental immunity.

Thus, the extent to which a federal tribunal could be empowered by federal legislation to make decisions binding on the Crown in right of a province depends entirely on the reach that the courts are prepared to give to the federal law of Aboriginal title, the fiduciary duties of the Crown, and Parliament's legislative authority under section 91(24). Despite the uncertainties that inevitably surround the courts' future interpretations of the constitution, we note that in the past the courts have generally taken a broad view of the scope of section 91(24). We regard the following observation made by Peter Hogg as eminently plausible:

It seems likely, therefore, that the courts would uphold laws which could be rationally related to intelligible Indian policies, even if the laws would ordinarily be outside federal competence.[378]

A federal tribunal and the constitutionally guaranteed jurisdiction of provincial superior courts

A problem of a somewhat different kind is posed by the judicature provisions of the *Constitution Act, 1867*, sections 96 to 100. These provide for the federal appointment of judges to the superior, district and county courts of the provinces; specify that the judges are to be selected from members of the bar of the province in which they sit; and underpin judges' independence by guaranteeing security of tenure until the prescribed age of retirement and the provision by law of salaries, allowances and pensions.

These sections have been held to prevent legislatures (both federal and provincial) from conferring on provincially created tribunals powers of a judicial nature that are identical or analogous to a jurisdiction historically exercised exclusively by superior, district or county courts. In addition, since it is an inherent part of the jurisdiction of a section 96 court to determine whether inferior tribunals have acted in breach of the duty of fairness or otherwise exceeded their legal authority, provincial legislation cannot remove the power of the superior courts of the provinces to exercise jurisdictional control over them.[379]

For the following reasons, these provisions do not present a serious constitutional impediment to the creation of an Aboriginal Lands and Treaties Tribunal. First, whether or not its jurisdiction is supplied in part by provincial legislation, the tribunal will be established by federal statute, and the orthodox view is that Parliament's power to create administrative tribunals in the federal

sphere is not subject to the same limitations as those restricting provincial competence. Sections 96-100 seem directed at the appointment and terms of office of judges of the superior courts in the provinces.

Second, even if the judicature sections of the *Constitution Act, 1867* were held to apply to federally created tribunals, a challenge to the constitutionality of the legislation would succeed only if it were established that the Aboriginal Lands and Treaties Tribunal had been given jurisdiction over matters that were at least analogous to those exclusively within the jurisdiction historically exercised by superior, district or county courts. While determinations of rights by reference to the federal common law of Aboriginal title or the Crown's fiduciary duties to Aboriginal peoples, for example, might be regarded as such a matter, many others would not.

For example, the superior courts historically have not had exclusive jurisdiction over the determination of questions of constitutional law: lower courts can be required to determine the constitutionality of the conduct of a police officer, and administrative tribunals may be empowered to decide constitutional challenges to the validity of their enabling legislation. Thus, there could be no objection to the tribunal's jurisdiction to interpret section 35 of the *Constitution Act, 1982* or the scope of Parliament's legislative authority under section 91(24) of the *Constitution Act, 1867* in the course of deciding a dispute. Since there is no aspect of the superior courts' jurisdiction that is analogous to the role proposed for the tribunal as monitor of the bargaining process between Aboriginal peoples and the Crown, section 96 could not be used to impugn this aspect of the tribunal's jurisdiction.

Third, the Supreme Court has upheld legislation conferring powers on provincial tribunals that were, considered in isolation, analogous to those of section 96 court judges but, when viewed in their wider context, formed part of an administrative scheme.[380] To the extent that the proposed tribunal is seen as an integral and ancillary part of the non-judicial process of resolving multi-faceted disputes by negotiation, it is likely to come within this exception. This view is strengthened by the importance to the tribunal of having non-lawyer and Aboriginal members, an independent research capacity and informal procedures.

Fourth, Parliament could resort to section 101 of the *Constitution Act, 1867* to create a federal tribunal. This expressly empowers Parliament to create additional courts for the better administration of the laws of Canada, "notwithstanding any other provision in this Act". It is a requirement of this

section, however, that the rights and obligations determined by this court must be based on federal law, which includes the law that the tribunal is most likely to administer — federal legislation, Aboriginal title, and the liability of the Crown in right of Canada. Because the tribunal's success depends on the diversity of background, perspectives and expertise of its members and the flexibility of its procedures, we do not recommend the creation of a body that is likely to be regarded as a court for purposes of section 101.

It is clear, however, that constitutional law imposes at least two limitations on the jurisdiction of the tribunal. First, on application for judicial review, a court could set aside a decision of the tribunal on the ground that Parliament lacked the constitutional authority to establish it.

Second, by express word or implication, legislatures can authorize tribunals to determine questions of constitutional law that arise in the course of their proceedings. However, when conferred, this jurisdiction cannot exclude the superior courts' inherent authority to determine the constitutionality of federal or provincial legislation on either division of powers or Charter grounds, or under section 35 of the *Constitution Act, 1982*. Nonetheless, it is within the discretion of the superior courts to decide in any given case whether to exercise their jurisdiction over constitutional challenges to the validity of legislation. The existence of an independent, specialized administrative agency with the capacity to decide questions of constitutional law, along with other matters that are squarely within its expertise, might satisfy a court that it should not make a ruling until the tribunal has rendered its decision.

If Parliament can entrust a tribunal with jurisdiction to decide a matter, it can make that jurisdiction exclusive of the superior courts of the provinces, except on questions of constitutional law. It would be tidy to sweep into the tribunal, the body designed specifically for resolving disputes of this kind, exclusive jurisdiction over matters within its statutory mandate. It would ensure that decisions made by the tribunal were informed by its expertise and would minimize inconsistencies and avoid 'forum shopping'.

Nonetheless, we propose that where a claim is justiciable, Aboriginal claimants should remain free to pursue it through the courts, rather than be forced to take it to the tribunal. It would be inappropriate to recommend legislation to remove an avenue of legal redress that Aboriginal peoples have sometimes found valuable. Moreover, to the extent that these claims fall within section 35 of the *Constitution Act, 1982*, the jurisdiction of the superior courts of the provinces cannot be removed. However, if the tribunal operates as we anticipate,

claimants should find it at least as satisfactory a forum as the courts.

**Recommendation**

The Commission recommends that

**2.4.37**

The tribunal's jurisdiction to determine specific claims be concurrent with the jurisdiction of the superior courts of the provinces.

***Structure***

The range of issues that could be assigned to the tribunal is large, geographically diverse, and of fundamental importance to a large number of Aboriginal nations and groups with distinctive histories, traditions and cultures. Some aspects of the tribunal's jurisdiction are likely to be needed for a finite period of time, while others may endure indefinitely. The composition of the tribunal will need to reflect the knowledge required for the resolution of particular issues. The procedures it adopts might need to vary according to the nature of the dispute before it. Also, its structure should reflect fully the very significant interest of the provinces in aspects of its operation.

In light of this diversity, should there be a single tribunal to exercise jurisdiction over all issues, regardless of where they arise or the Aboriginal peoples they involve? Or should there be several tribunals, perhaps based on geography, subject matter (self-governance or specific claims, for example), or the degree to which the dispute involves lands or resources to which the Crown in right of a province holds the underlying title?

The selected structure should seek to combine the organizational advantages of a centralized agency with the responsiveness that could be achieved through a series of more specialized tribunals. Perhaps this balance can be struck through a tribunal that is established on a Canada-wide basis but operates through panels appointed in connection with particular matters. A single tribunal, with internal devolution, has the great virtue of avoiding uncertainties and wrangles about which tribunal has jurisdiction over any given matter. It is also important that Aboriginal peoples not have to divide up their grievances to fit different institutional mechanisms but instead have them considered as a whole.

The tribunal could also provide a registry, with offices located across the country, for filing documents and performing other related functions for matters referred to the tribunal. The tribunal could maintain a library containing, among other things, a record of the research conducted for the panels, together with their decisions. Although not legally binding, the results of research and reasoned decisions in other cases would provide invaluable assistance to subsequent claimants and panels and introduce into the process a welcome level of consistency, expertise and efficiency.

Senior permanent members of the tribunal would constitute its executive, which would have regional representatives. The role of the executive would include overseeing, co-ordinating and being publicly accountable for the tribunal's operations and budget. It might be efficient as well for the tribunal to provide central legal services and a small research staff, on which panels could call as required.

Apart from the permanent full-time members of the tribunal with executive responsibilities, others would be appointed on a provincial or regional basis. They would be assigned to particular disputes on the basis of their knowledge and experience with the issues. Members of a panel could be selected by the claimants and the federal and provincial governments, with a mutually agreed chair. If the parties could not agree on a chair, the selection could be made by the tribunal.

It can sometimes be difficult to know when the local and specialized knowledge that is desirable in tribunal members threatens the appearance of impartiality and independence. This issue is important in the context of the Supreme Court's recent decision in *Canadian Pacific Ltd.* v. *Matsqui Indian Band*.[381] Some members of the court expressed the view that the tax appeal committee established by the band council was not sufficiently independent of the council to provide an adequate alternative to judicial review. However, as experience with tripartite labour arbitration boards indicates, courts are liable to take a contextual approach to standards of independence and impartiality when the composition of an agency is designed to reflect the general perspectives of each of the parties. Nonetheless, attention will need to be given to avoiding potential conflicts of interest when panel members are selected.

As the *Matsqui Indian Band* decision reminds us, the terms of appointment of members of a tribunal have an important bearing on the independence of the tribunal and the degree of public confidence that it attracts. We propose that for

the duration of their appointments, members be dismissable only for cause. Other aspects of appointment that should be considered from this perspective include duration, reappointment, remuneration, and disciplinary authority and process.

To ensure that members are widely representative of Aboriginal peoples and have a broad range of knowledge, most tribunal members would serve part-time, as is commonly the case with members of human rights tribunals and labour arbitrators, for example.

### *The appointment of members*

The credibility and legitimacy of the tribunal will depend on its composition and the process for appointing members. Three points of principle stand out.

First, Aboriginal nominees, both men and women, must be fully represented at all levels of the tribunal. Half the members of decision-making panels should be Aboriginal members of the tribunal, or as close to half as may be permitted by an uneven number. The tribunal should also have Aboriginal and non-Aboriginal nominees as co-chairs. This principle can be implemented by giving Aboriginal groups the right to nominate candidates for half the positions on the tribunal, including one of the co-chairs, and by providing that half the members appointed to the tribunal at all levels by the federal government be nominated by Aboriginal groups.

Second, the membership of the tribunal should be representative of all regions of Canada, and provinces that delegate legislative power to the tribunal should have the right to nominate full-time members, as well as half the non-Aboriginal part-time members who will decide disputes that arise within their boundaries.

Third, the process of appointing members must meet growing public demands for openness, equity and accountability. For example, all nominations for membership should be subject to approval by a screening committee that is broadly representative of the principal stakeholders. The government, on the joint recommendation of the minister of justice and the proposed minister of Aboriginal relations, could appoint from among nominees approved by the committee.

## Recommendations

The Commission recommends that

**2.4.38**

The membership and staff of the tribunal

(a) reflect parity between Aboriginal and non-Aboriginal nominees and staff at every level, including the co-chairs of the tribunal; and

(b) be representative of the provinces and regions.

**2.4.39**

The process for appointing full-time and part-time members to the tribunal be as follows:

(a) the appointment process be open;

(b) nomination be by Aboriginal people, nations, or organizations, the federal government, and provinces that delegate powers to the tribunal;

(c) nominees approved by a screening committee be qualified and fit to serve on the tribunal;

(d) members be appointed by the federal government on the joint recommendation of the minister of justice and the proposed minister of Aboriginal relations; and

(e) the terms of appointment of the co-chairs and members provide that, during their period of office, they be dismissable only for cause.

***Procedure***

It would not be useful at this stage to prescribe codes of procedure for the tribunal and its panels. There ought to be room for experimentation and variation, based on the type of claim and proceeding being heard and the preferences of the parties. Whatever procedures are adopted should help, not hinder, the ability of the panel to reach timely and fully informed decisions; they should provide an adequate opportunity for the parties to participate in the decision-making process in a constructive manner and minimize the need for

professional representation; they should respect oral traditions of Aboriginal peoples; and they should be the product of prior consultation, Aboriginal world views, values and experience.

It will be important to free the panels' proceedings from undue constraints imposed by rules of evidence developed in the very different context of adversarial courts. There should be little place for the parol evidence rule, for example, which restricts the introduction of evidence other than the written text of an agreement in order to determine its terms. Aided by researchers, panel members should assume an active role in identifying the issues, the research agenda and methodology, and potential witnesses and evidence. The procedure should more closely resemble an inquiry than the adversarial model.

**Recommendation**

The Commission recommends that

**2.4.40**

The tribunal operate as follows:

(a) emphasize informal procedures, respect the oral and cultural traditions of Aboriginal nations, and encourage direct participation by the parties;

(b) take an active role in ensuring the just and prompt resolution of disputes;

(c) maintain a small central research and legal staff and provide a registry for disputes; and

(d) hold hearings as close as is convenient to the site of the dispute, with panels comprising members from the region or province in question.

Judicial review

Should tribunal decisions be subject to review by the courts? As a federally created agency, it might not be subject to the rule established in *Crevier* v. *Attorney General of Quebec*, where the Supreme Court held that the constitution makes provincially created tribunals subject to review by the superior courts for jurisdictional error.

Nevertheless, it is clear that the decisions of all tribunals are subject to review on questions of constitutional law. In addition, legislation cannot oust the jurisdiction of superior courts to determine at first instance the extent of a person's constitutionally entrenched rights and whether they have been breached by statute or otherwise; however, given the existence of a more appropriate forum, a court may resolve in its discretion not to decide the issue until the completion of the tribunal proceedings in which the issue has arisen or is likely to arise. Even if *Crevier* were held not to apply to federal tribunals, a legislative attempt to insulate the tribunal from judicial review on non-constitutional issues would be liable to attract to the legislation, and to the tribunal in particular, unhelpful and unnecessary controversy.

On the other hand, to afford unrestricted access to the courts would increase the cost of reconciliation and delay its progress. An appropriate balance would be to subject the tribunal, like other major federal administrative agencies, to review in the Federal Court of Appeal. However, given the importance of avoiding delays in resolving questions before the tribunal, minimizing the cost of judicial review, and respecting the expertise of the tribunal and its representative composition, the grounds for review should be restricted to questions of constitutional law, jurisdiction and procedural fairness. Similar restrictions, and for some of the same reasons, already attach to the review of decisions by administrative agencies operating in the area of labour law, including the Canada Labour Relations Board.

**Recommendation**

The Commission recommends that

**2.4.41**

Decisions of the tribunal be final and binding and not subject to review by the courts, except on constitutional grounds and for jurisdictional error or breach of the duty of fairness under paragraphs 18.1(4)(a) and (b) of the *Federal Court Act.*

## 6.5 The Need for Public Education

We have emphasized the need for public education about the role treaties played in the creation of Canada and about the rights and obligations they conferred on all peoples who share this land. The treaty processes and other

measures recommended in this chapter will require not only the energetic participation of government but also, to be successful, understanding and acceptance by the general public and Aboriginal people. This may not be easy to achieve. Public opinion polls in the past few years have consistently shown broad sympathy for Aboriginal issues and concerns, but that support is not very deep. More recent events have brought about a hardening of attitudes toward Aboriginal issues in many parts of the country. This is true especially in rural areas, the northern parts of some provinces and urban areas that border some of the large southern reserves. This growing hostility can be traced in large part to recent negative publicity over land claims, Aboriginal hunting and fishing rights, and issues of taxation.

The current economic situation has also had an impact on public attitudes. Greater competition for government program funds has meant that moneys earmarked for land claims settlements or other measures to increase the Aboriginal land and resource base are seen increasingly in zero-sum terms — as Aboriginal people win, the general society loses. The range of such opinions and the force with which they are expressed were evident in our hearings and in submissions made to us.

In response to such concerns, non-Aboriginal governments have been devoting more attention to consultations with the public on Aboriginal issues. In the case of the B.C. treaty process, for example, the parties have established a series of 'side tables' for municipalities and advocacy groups, which insist that their interests or those of the broader citizenry are not being represented. Government negotiators believe that active public involvement will speed resolution of the particular land claim or other issue by promoting the crucial 'buy-in' from the non-Aboriginal population. Commissioners certainly agree that for the long-term success of such initiatives, personal and community-level co-operation is essential. Mayor Barrie Conkin of North Battleford, Saskatchewan, expressed the frustration of many participants in our hearings when he noted that, with respect to land claims settlements and other Aboriginal issues, "federal and provincial governments have made promises the ordinary citizen at the grassroots level does not understand and does not feel part of".[382] As we will see, similar complaints are being made by members of Aboriginal communities.

Public consultation, then, is an absolute necessity for the success of the measures we recommend in this section. Such consultation needs to be carried out very carefully, however. In fact, unless it is coupled with a serious program of public education, it may actually slow down the resolution of Aboriginal

grievances. Moreover, it could worsen, rather than improve, relations between Aboriginal and non-Aboriginal people. As we have seen throughout this chapter, a significant minority of Canadians — including many government officials — do not accept even the basic premises of current negotiations. On many issues, it is clear from the hearings and submissions that Aboriginal people and the general public do not share even common definitions — of conservation, for example. Moreover, it is apparent that many Canadians still subscribe to the views set out in the federal government's 1969 white paper on Indian policy, which recommended the termination of treaties and the elimination of distinct legal status for Aboriginal peoples.

Throughout our report, we have rejected the premises on which the white paper was based and recommended a new relationship with Aboriginal peoples based on principles of mutual recognition, respect, sharing and responsibility. Nevertheless, these attitudes must be discussed openly as part of a public education process dealing with lands and resources issues. In particular, that discussion must highlight the fundamental relationship that Aboriginal people maintain with the land. We note, for example, that in light of recent confrontations in Ontario and British Columbia, the member of Parliament for Churchill, Elijah Harper, has convened a circle of Aboriginal and non-Aboriginal spiritual leaders to seek new ways of healing disputes over matters of lands and resources. It is our view that this kind of intercultural initiative helps restore an important spiritual dimension to a dialogue that, if it has existed at all, has been overly materialistic.

### *The role of non-Aboriginal governments*

In general, non-Aboriginal governments have an obligation to develop and support policies of public education and discussion in connection with the treaty processes. Not only do Aboriginal governments currently lack the resources to do so, they would argue that federal, provincial and territorial governments bear full responsibility for the fact that so many citizens do not understand Aboriginal issues. However, provinces can argue that the federal government — given its constitutional responsibilities — should bear the cost of public education programs connected with land claims or other such negotiations. There is no reason that these programs should be treated differently from other public consultation exercises currently under way across the country. They are funded, depending on circumstance, by either or both orders of government.

Governments have a particular responsibility to educate their own employees about Aboriginal lands and resources issues. It should not be limited to

explaining the implications for provincial or federal legislation of court decisions on Aboriginal rights. In many jurisdictions, police officers, court workers and other officials who deal regularly with Aboriginal people already receive cross-cultural awareness training. The same has not been true for government employees involved in areas of public lands and resources management — forestry, parks, fisheries and wildlife — where they interact regularly with Aboriginal people, often in an enforcement role.

Cross-cultural education and training is also important to the success of claims settlements or analogous agreements. It is one thing for government negotiators or other senior officials to bring back agreements for implementation. Government personnel responsible for implementing the provisions of the agreement also need to understand the concepts behind the agreements and to buy in to the resulting process. If not, shared management schemes that rely on such officials for technical and other support will fail.

### *Aboriginal governments*

The issue of buy-in is also a concern for Aboriginal governments. In many instances, there has been a lack of awareness among community members with respect to the overall intent and provisions of lands and resources agreements negotiated with non-Aboriginal governments — something that on occasion has promoted community backlash. This makes the agreements themselves vulnerable at the ratification stage. The Dene-Métis land claims agreement, for example, was rejected in 1990 by Dene and Métis general assemblies. The first two agreements negotiated by the Council for Yukon Indians met the same fate. In southwestern Ontario, at the Chippewa Thames reserve, ballot boxes were stolen and destroyed to annul a vote on a specific land claims settlement. In northeastern Ontario, in 1994, the Temagami First Nation — an *Indian Act* band — rejected an agreement in principle with the provincial government that had been negotiated by the Teme-Augama Anishinabai, which represents status and non-status people.

This issue has also arisen during the development and negotiation stages of agreements. For instance, tribal councils and other political organizations involved in negotiations on community-based self-government, land claims and other matters have often found that, despite their best efforts, community understanding is largely absent. The result, in some cases at least, is that individual First Nations have withdrawn from involvement. The basic problem is that the negotiators sometimes get ahead of the community and there is slippage, resulting in further delays, ambivalence or schism. At the level of the

nation, general awareness and co-ordination may be lacking in terms of concrete action or the ability to deliver. As we concluded in Chapter 3, Aboriginal governments require the opportunity and capacity to educate their citizens and renew their institutions.

The issue of community acceptance or buy-in applies to both sides of the treaty negotiation process. Whether treaties are to be made, implemented or renewed, there must be mutual respect for the terms of the agreement. Negotiators need to pay equal attention to the internal renewal that must take place within and among Aboriginal communities as well as to accountability and public education.

### *The language of agreements*

One immediate and concrete step that can be taken toward public education is to improve the language of treaty documents and other such agreements. As we saw earlier in this chapter, treaty documents are overly legalistic, filled with minutiae and virtually incomprehensible to the lay reader — not to mention inaccessible to the many Aboriginal people whose principal language of communication is an Aboriginal one. We endorse the statement of Alvin C. Hamilton in his recent fact finder's report to the minister of Indian affairs: "Future treaties must be able to provide certainty for the parties, and for those affected by them, and to do so they must be understandable".[383] We encourage the drafters of agreements to think of their eventual audience and to bring in professional writers, if necessary, to aid in the production of clear, comprehensible documents.

### *Aboriginal outreach*

While Aboriginal people individually are not responsible for public misunderstanding of lands and resources issues, they can still play a role in educating their neighbours. This involvement can take many forms. Already a number of Aboriginal organizations have outreach activities aimed at reaching local and regional communities, particularly in British Columbia, Quebec and other provinces. Many Aboriginal organizations provide speakers on Aboriginal issues to schools, service clubs, chambers of commerce and other community organizations.

Across the country, schools, libraries and local historical societies are searching for materials on Aboriginal history and culture. What they find is most often too general or largely inaccurate. What they want is material that relates

to Aboriginal people in their own area. Many Canadians do not know whether where they live is covered by treaty, or if they do, they have no real idea of the treaty's contents or why it was made.

Many First Nations, tribal councils, and provincial and national Aboriginal organizations have reports and other material, much of it unpublished, bearing on tribal and local history and culture. A great deal of it is the product of land claims research over the past 20 years. While sensitive information could be protected, an outreach program to disseminate this information, particularly in local and regional schools and libraries, could have a long-term impact on public opinion.

If nothing else, this material would help dispel the misconception in many parts of Canada that land claims are a new phenomenon, and it would provide a partial rejoinder to the argument that historical wrongs are not the responsibility of present generations. Non-Aboriginal people should know that, in many cases, it was their own parents and grandparents — not distant government officials — who benefited directly from the wrongful alienation of Aboriginal lands and resources.

### *Government accountability*

Public education is not a top-down exercise. If the constitutional talks of the 1980s proved nothing else, they proved that Canadians are increasingly suspicious of their governments. This view was stated emphatically at our hearings. Indeed, far from regarding government negotiators as their representatives, many residents of rural and northern Canada see government — along with environmentalists and other 'outsiders' — as a disruptive influence on their long-standing relations with local Aboriginal people. Aboriginal people do not share wholeheartedly in this rosy view of a common past, but they can find themselves the victims of a government's urge to do the right thing. Long after the negotiators have left, it is they who must continue to live with their non-Aboriginal neighbours.

If public education is to be an important part of treaty processes, there are advantages to having that function performed by someone other than the immediate parties to negotiations. This need not jeopardize the principle of government-to-government negotiations. Outside facilitators have been employed already in a number of claims negotiations, and local communities include many respected individuals capable of playing a similar role. Such people could be responsible for disseminating information about the specific

issues involved in negotiations — including any research — and for generating discussion of the broader principles of treaty and Aboriginal rights.

It is important that public information be shared and that it be perceived as coming from a neutral source. Ironically, government-commissioned research is often treated with suspicion by Aboriginal and non-Aboriginal people alike. For example, the ad hoc committee for the defence of Algonquin Park, which is opposing current negotiations with the Algonquin of Golden Lake, has been refused access to provincial and some federal research reports on the claim and related matters. As a result, the committee has been carrying out its own research and publicizing the results in a series of newsletters.

For genuine healing and reconciliation between Aboriginal and non-Aboriginal people, therefore, treaty processes must encourage dialogue, and the contents of negotiations must be explained comprehensively and clearly.

**Recommendation**

The Commission recommends that

**2.4.42**

Public education be a major part of treaty processes and of the mandates of the treaty commissions and Aboriginal Lands and Treaties Tribunal, in keeping with the following principles:

(a) federal and provincial governments keep the public fully informed about the nature and scope of negotiations with Aboriginal peoples and not unduly restrict the release of internal reports and other research material;

(b) Aboriginal parties participate in educating the general public and ensure that their members fully understand the nature and scope of their negotiations with provincial and federal governments;

(c) the federal government ensure that negotiation processes have sufficient funding for public education; and

(d) treaties and similar documents be written in clear and understandable language.

# 7. Securing an Adequate Land and Resource Base for Aboriginal Nations

Only substantive change, represented by the new treaty processes and the Aboriginal Lands and Treaties Tribunal, can fully resolve outstanding issues and provide the land and resource base that Aboriginal nations require for self-government and self-reliance. At the same time, we recognize the difference between long-term and short-term solutions. Some of the measures we have recommended, especially those requiring new or amended legislation, will take time. In the interim, there are many things that non-Aboriginal governments can do — and are already beginning to do — within the existing legal and policy framework that would provide a better situation for Aboriginal people. In this section, we outline a number of such transitional measures, with recommendations on their implementation.

First, we discuss broad questions of land reform, principally for First Nations. We begin with the urgent need for an interim specific claims protocol, which will last until the Aboriginal Lands and Treaties Tribunal is established. Next, we suggest improvements to several of the existing related processes by which First Nations can add to their land base. Because of the division of constitutional powers, the federal government will have primary responsibility in this area, although it will necessarily involve negotiations with provincial, territorial and, in some cases, municipal governments where their interests are involved.

Second, we cover general issues of improved access to natural resources on public lands for all Aboriginal peoples, as well as tenure arrangements that would allow more space for Aboriginal title and jurisdiction on-reserve (in the case of First Nations) and on Crown lands.

Third, we examine co-jurisdiction and co-management arrangements, in the overall context of provincial land and resource management policies. While all questions involving natural resources will require the consent and active involvement of provincial and territorial governments, we recommend a much greater level of active participation on the part of the federal government.

The word ‘interim’, as we use it throughout this section, does not always mean temporary. Some of the measures we recommend, such as an interim specific claims protocol, are clearly transitional, and many short-term changes to provincial land and resource management policies and regulations will

undoubtedly be embodied in future agreements with Aboriginal nations. However, other measures, particularly those touching on questions of natural resource allocation, are immediate and can be implemented regardless of whether they eventually form part of the negotiation process for new or renewed treaties.

We have been critical of past action (or in some cases, inaction) on the part of all levels of government. But we also wish to recognize instances where there has been significant progress, whether in Aboriginal access to resources, in self-regulation or in co-management ventures. Much of this movement has come from the provinces and territories, often with little or no co-operation from the federal government and at times in the face of vigorous opposition. Such achievements reinforce our hope and expectation of energetic involvement on the part of all governments.

## 7.1 Interim Steps: Expanding the First Nations Land Base

The linked processes of treaty making and treaty implementation and renewal provide the best route to securing an adequate land base for all Aboriginal peoples. For First Nations people, however, there are already several means by which they can add to their existing land base. These include the settlement of specific claims or past grievances and unfulfilled land entitlement under previous treaties or agreements; compensatory land provisions (such as the Manitoba Northern Flood Agreement); and the purchase of land on the open market. Other measures would also assist in providing more land for Aboriginal people, such as the return of unsold surrendered lands and of lands expropriated previously.

These are all practical means of providing an expanded land base for First Nations communities. Moreover, they can all be implemented without prejudice to future treaty negotiations. The needs are immediate, and Commissioners believe that they deserve to be pursued. However, in each case, practical problems make it difficult to reach or implement agreements. These problems are set out below.

### *An interim specific-claims protocol*

Only an independent body with a legislative basis, such as the Aboriginal Lands and Treaties Tribunal, can remove the current conflict of interest created when the federal government serves as funding agent, defence counsel, judge

and jury in matters involving its own past conduct. Until the tribunal has been established, however, the current specific claims policy must be amended to introduce more fairness in its operations and to speed up claims resolution. Our discussion follows the lines suggested by the proceedings of the joint AFN-federal government working group on claims and the neutral draft of recommendations.[384]

With respect to criteria, the current specific claims policy states that the federal government will consider claims based on non-fulfilment of treaty terms. In practice, however, the government does not accept grievances relating to the interpretation of treaties. Harvesting rights are a prominent example — as in the government's recent refusal to consider claims of the Athabasca Denesuline to Aboriginal or treaty harvesting rights north of the 60th parallel.[385] We believe that the current policy must be open to treaty-based claims.

With respect to compensation, we draw two conclusions. We observed that the guidelines that federal negotiators apply in settling claims are inconsistent, arbitrary and not in keeping with the fiduciary principles set out in *Guerin* and other Supreme Court decisions. The main purpose of these guidelines is apparently to limit the financial obligations of the federal government. In effect, claimants are being offered compensation far less than the courts would likely award, with the result that the policy is no longer a viable alternative to litigation. The specific claims policy itself does not need to be revised to eliminate this inequity; but the compensation guidelines should be amended or interpreted to permit the application of fiduciary principles of legal obligation and compensation.

In almost all instances, the federal government also offers only cash compensation to settle claims. For the reasons set out in this chapter, we believe the primary purpose of claims resolution should be to provide Aboriginal nations with greater access to and control over their traditional territories. Cash compensation should be paid only if full restitution is impossible or impracticable or not desired by the nation in question.

The federal government should respond promptly to the recommendations of the Indian Claims Commission, which currently serves as a forum for bringing forward rejected claims. We agree with the claims commission that government delays and inaction are unconscionable; they are slowing the process of claims resolution and undermining the commission's effectiveness.[386] We also believe that the federal government should improve access to the claims commission and to the expertise the commission has developed in cross-cultural mediation

and negotiation.

**Recommendation**

The Commission recommends that

**2.4.43**

The federal government enter into an interim specific claims protocol with the Assembly of First Nations embodying, at a minimum, the following changes to current policy:

(a) the scope of the specific claims policy be expanded to include treaty-based claims;

(b) the definition of ‘lawful obligation’ and the compensation guidelines contained in the policy embody fiduciary principles, in keeping with Supreme Court decisions on government’s obligations to Aboriginal peoples;

(c) where a claim involves the loss of land, the government of Canada use all efforts to provide equivalent land in compensation; only if restitution is impossible, or not desired by the First Nation, should claims be settled in cash;

(d) to expedite claims, the government of Canada provide significant additional resources for funding, negotiation and resolution of claims;

(e) the government of Canada improve access to the Indian Claims Commission and other dispute resolution mechanisms as a means of addressing interpretations of the specific claims policy, including submission to mediation and arbitration if requested by claimants; and

(f) the government of Canada respond to recommendations of the Indian Claims Commission within 90 days of receipt, and where it disagrees with such a recommendation, give specific written reasons.

***Fulfilment of treaty land entitlements***

The general question of unfulfilled entitlement to reserve lands will most properly be dealt with under the new treaty implementation and renewal

process, with the Aboriginal Lands and Treaties Tribunal serving as the forum for unresolved issues. But many First Nations (as in Saskatchewan) are already involved in processes dealing with treaty land entitlement. The parties may wish to continue with those processes while the Commission's general recommendations are being implemented.

Many treaties negotiated with Aboriginal people provided for the selection of reserve lands. Until Confederation, these lands were simply exempted from the general description of lands covered by treaty; later, they were set apart for Aboriginal beneficiaries out of the totality of lands covered by the treaties.

The post-Confederation numbered treaties — covering much of western and northwestern Canada (see Figure 4.8) — provided specific formulae for calculating the quantum of reserve lands. Depending on the treaty, the signatory tribes or bands were to choose reserve lands of between 160 and 640 acres per family of five.

As several of the treaty case studies conducted for the Commission showed, not all of the contemplated reserves were actually created. Of those that were created, many First Nations communities argue that the population of signatory bands was calculated incorrectly, so that the reserves were not the proper size. These issues currently form the subject of specific land claims in various parts of northern and western Canada.

Parallel to the specific claims process, and in most instances tied directly to it, there have been various attempts to resolve questions of outstanding treaty land entitlement. After a failed attempt, in the 1970s, to resolve outstanding issues of entitlement in Saskatchewan, a treaty commission was established in 1989 to advise the department of Indian affairs and the Saskatchewan Indian Federation on outstanding treaty issues. The commission turned its attention to the entitlement issue and issued a report in 1990. In 1982, the government of Manitoba had created its own treaty land entitlement commission to address — from a provincial perspective — the claims of 27 Indian bands that signed various of the numbered treaties.[387]

The findings of the two commissions were quite similar, dealing with the interests of third parties, loss of municipal tax assessment, and the categories of land that should be available for selection. Although subsequent negotiations have encountered many difficulties, some agreements have now been reached in Saskatchewan (though not in Manitoba, where negotiations were inconclusive) that will see money handed over to Aboriginal people for the

purchase of land on the open market. That process will be under way for many years.

One general problem affecting all unfulfilled land entitlement discussions is the issue of the appropriate amount of acreage to be set aside on a per capita basis for First Nations people under treaty terms. The written texts of the numbered treaties are silent regarding the date at which the base population is to be enumerated for the purposes of determining reserve land quantum. Canada has generally interpreted the ambiguity to mean that lands were to be selected based on total membership at the time of treaty, or at the time of survey following reserve selection.

For their part, First Nations people disagree passionately with the specific land quantum set out in the treaty texts, insisting that this was not their understanding of the treaty negotiations. Reserves, they say, were intended to provide a basis for their self-sufficiency in the future. As a result, they have consistently argued that modern land entitlement should be calculated on the basis of current population figures. The so-called ‘Saskatchewan formula’, which was to have applied in both

Saskatchewan and Manitoba, represented a compromise between these two positions. Land quantums were to be divided up according to treaty band populations as of 31 December 1976. Canada has since backed away from this formula (as has Manitoba), arguing once again that its ‘lawful obligation’ is confined to population at the date of first survey. To do otherwise, say federal officials, would be unfair to bands that received their entitlements long ago.

Federal policy on land entitlement has never been consistent. New reserves have been set apart on many occasions since the 1930s with, in several instances, the quantum of reserve land being calculated on the basis of contemporary population figures, not those at the time of the treaty or first survey. This makes it difficult for Canada to argue that the strict wording of the treaty texts prevents the same being done again.

First Nations and their political organizations point to the rate of natural increase in on-reserve population as a significant reason for using modern population figures in calculating quantums. They also argue that Bill C-31 registrants have enlarged many band populations since the 1976 formula was established. We believe the Aboriginal position makes good sense. It acknowledges the current needs of First Nations communities and avoids the expense and associated delay that results from arguing over historical

population figures.

It is extremely difficult to establish historical population figures. Except in rare cases, there are no accurate government census records for communities in the period before treaty, and the registers of Indian missions, while informative, are based on religious affiliation, not group identity. Moreover, the penetration of Christianity among northern and western First Nations was far from comprehensive before the early twentieth century.

The department of Indian affairs bases its calculations for entitlement purposes on treaty pay lists. But those pay lists, particularly in the early years after treaty, are difficult to interpret. Because most Indian agents did not speak the languages of their clients, they had trouble rendering Aboriginal names into English. Especially in northern regions, some treaty beneficiaries either refused to take payment or did not show up for annuities until many years later. Agents also complained of what they saw as frequent inter-band movement, with members of the same family showing up on different pay lists in the same or subsequent years. In fact, what this showed was that treaty pay lists did not necessarily represent actual group identity.[388]

Federal calculations also ignore the impact of the *Indian Act* on band membership lists. It is well known that the act excluded women who married non-Indians, along with their descendants. In addition, if the date of first survey, rather than of treaty signing, is used, band numbers in some instances show a decline. Numbers could also drop because of the effects of epidemic diseases such as measles and influenza before 1920.

There are also broader issues involved in any discussion of treaty land entitlement. The case studies conducted for the Commission demonstrated that the treaty texts are open to interpretation on more than just the issue of the date at which land quantums were to be calculated. For example, while the reserves on Lake Huron and Lake Superior under the Robinson treaties of 1850 are defined in terms of miles, the Ojibwa participants believed that they were reserving lands on the basis of French leagues (one league equals approximately 2.5 miles), the only European unit of measure with which they were familiar.[389]

It should not be assumed, therefore, that those who participated in later agreements, such as the northern Cree and Dene who took part in Treaty 10, even understood the meaning of units of measure such as an acre or a square mile. Indeed, in most of the northern treaties, reserves were not surveyed and

set apart until many years after the agreements were signed, if at all. Many of the Treaty 8 reserves in northern Saskatchewan, Alberta and British Columbia, for example, were not created until the 1950s and ‘60s, more than half a century after the treaty was signed.

However, the Aboriginal position on treaty entitlement leaves one important issue unaddressed. As the Federation of Saskatchewan Municipalities points out, almost two-thirds of Saskatchewan First Nations people, including long-time band members and Bill C-31 registrants, now live in urban areas. Should urban band members be part of the calculation of treaty land entitlement, particularly when it is unlikely that they will ever return to live on-reserve? It could be argued that it may be more appropriate to use their numbers when calculating new treaty land entitlement in urban areas.

Canada, as well as some of the provinces, regards the entitlement process as a particular kind of specific claim that will provide a final solution to the treaty issue. But First Nations object that government is once again trying to impose its own agenda. They believe that treaty land entitlement is simply throwing money at a deeper problem. Unless the true spirit and intent of the treaties are recognized and implemented, it is clear that many of them will not accept the process as resolving the issue. This is an excellent example of why a long-term process of treaty implementation and renewal is preferable to any short-term solution on treaty land entitlement.

Nation building must occur before nations enter into the revised treaty process. Treaty entitlement will be an important part of that process, which should be as inclusive as possible.

**Recommendation**

The Commission recommends that

**2.4.44**

The treaty land entitlement process be conducted as follows:

(a) the amount of land owing under treaty be calculated on the basis of population figures as of the date new negotiations begin;

(b) those population figures include urban residents, Bill C-31 beneficiaries and

non-status Indians; and

(c) the federal government negotiate agreements with the provinces stipulating that a full range of land (including lands of value) be available for treaty land entitlement selection.

### *Purchase of land*

Many First Nations communities, particularly those in heavily populated regions of the country, have been attempting to increase their reserve land base by purchasing property on the open market. Since most Canadians broadly support private property rights, one would expect little opposition to such a practice. The Commission heard, for example, from Chief Gerald Beaucage of the Nipissing First Nation near North Bay, Ontario, that his community has been using a variety of revenue sources, including the proceeds of specific land claims settlements, to buy bush lots and farm land in the townships surrounding their reserve.[390] These townships were originally part of their reserve, having been surrendered in the early part of this century.

In this particular case, there has been little or no controversy. Much of the land is of marginal value to the seller, and the properties are being acquired at fair market value. Thus, the principle of 'willing seller, willing buyer' can be seen to apply. Nevertheless, in many other localities, such purchases of private land have sparked protests.

In October 1993, the Township of Onondaga, which borders the large Six Nations reserve in southern Ontario, passed a resolution protesting any First Nation purchases of land outside reserve boundaries. While recognizing the right of all Canadians to buy and own land, the resolution opposes the right of Aboriginal people to purchase private property and have it become part of a reserve. The stated reason is the potential loss of municipal tax assessment and the effect of such loss on school funding and the provision of municipal services. The township resolution demands that the federal government compensate municipalities for the loss of tax base and directly fund the continued provision of services to the reserve. It petitions the government to defer all decisions regarding land claims and the addition of what it calls "non-native lands" to reserves until federal policy on such matters has been reviewed by all Canadians.391

Having circulated the resolution to other municipalities in Ontario, the township attracted widespread support, particularly from municipalities affected by actual

or potential land claims. The controversy could therefore have an impact on current land negotiations, not only with First Nations in Ontario, but elsewhere across Canada. According to a brief to the Commission from the union of Quebec municipalities, 80 municipalities in Quebec either border on or are close to an Aboriginal community.[392] The number of municipalities potentially affected in provinces such as Saskatchewan and British Columbia is even larger.

Ironically, the apparent source of the Onondaga township grievance is not reserve status itself, but a section of the Ontario *Assessment Act* that exempts First Nations property from municipal taxes. The province of Ontario argues that the federal government should invoke the provisions of its 1991 Additions to Reserve policy whenever a First Nation purchases the land, not just when it first applies for reserve status.

According to that policy, Canada will not normally grant reserve status to lands within municipal boundaries until the First Nation and the affected municipality have reached a formal agreement on areas of concern. These areas include loss of tax assessment; provision of and payment for municipal services; the application, enforcement or harmonization of by-laws; and land-use planning.[393]

We certainly favour negotiations between Aboriginal people and other interested parties. In their submission, the Federation of Canadian Municipalities recommended that joint committees be formed with representation from municipalities and neighbouring Aboriginal governments to deal with issues of common concern.[394] This is an excellent suggestion, which we fully support.

While it is essential that municipal interests be considered in issues of reserve expansion, it was surely not the intent of the federal policy to give municipalities a veto over reserve creation. This would prevent a First Nation from obtaining reserve status for any newly acquired lands.

It is also important to point out that Aboriginal people have been purchasing land for purposes other than reserve land expansion. Inuvialuit, for example, have been using the money from their land claims settlement to buy property in urban areas as an investment. In that sense, they are no different from any other institutional investor. The additions to reserve policy has no relevance to this type of activity.

**Recommendation**

The Commission recommends that

**2.4.45**

Land purchases be conducted as follows:

(a) the federal government set up a land acquisition fund to enable all Aboriginal peoples (First Nations, Inuit and Métis) to purchase land on the open market;

(b) the basic principles of 'willing seller, willing buyer' apply to all land purchases;

(c) joint committees, with representatives from municipalities and neighbouring Aboriginal governments, be formed to deal with issues of common concern;

(d) the federal government do its utmost to encourage the creation of such committees;

(e) the federal government clarify the 1991 additions to reserves policy to ensure that the process of consultation with municipalities does not give them a veto over whether purchased lands are given reserve status; and

(f) the federal government compensate municipalities for the loss of tax assessment for a fixed sum or specific term (not an indefinite period), if the municipality can show that such loss would result from the transfer of the purchased lands to reserve status.

Unsold surrendered lands

Since the mid-nineteenth century, First Nations in many parts of Canada have surrendered lands conditionally to the federal Crown (often under protest) so that such lands could be sold for their benefit. A surprising quantity of those lands were never sold, and they continue to occupy a curious limbo in the federal land registry system. Though they are no longer reserve lands, they remain 'Indian lands' as defined in the *Indian Act*, and their disposal is handled by the department of Indian affairs. The department does not actively manage them, however. While they are not provincial Crown lands, local non-Aboriginal

residents generally treat them as such — and have been known to raise objections when the issue of returning such lands to First Nations control is broached.

The map of present and past reserves on Lake Huron is a good illustration of unsold surrendered lands (see Figure 4.7). At Sault Ste. Marie, Garden River and Thessalon, for example, the original reserve area is outlined in grey around the much smaller contemporary reserves. Though these lands were surrendered long ago, half the grey area or more remains unsold to this day.

The return of such lands would be an excellent way to provide for community expansion, particularly since these lands have remained legally under federal jurisdiction and control. Considerable progress is now being made in some regions. Figure 4.7 shows a large area of surrendered land around the present reserve on Lake Nipissing. On 30 March 1995 the governments of Canada and Ontario signed an agreement with the Nipissing First Nation community to return 13,300 hectares of unsold land in Beaucage and Commanda townships (the residue of 22,840 hectares originally surrendered for sale in 1904 and 1907) to community control. The agreement maintains easements for transportation and utility purposes and protects the access rights of private landowners, as well as the continued public use of waterways that pass through the lands in question.[395]

Such protection for existing third-party interests is clearly an important consideration in the return of unsold surrendered lands. The terms of the Nipissing agreement conform to the general principles for the treatment of such interests. We note, however, that the Nipissing First Nation community first approached the federal government in 1973 about securing the return of these unsold surrendered reserve lands.[396] Sadly, such delays have plagued the claims resolution process.

**Recommendation**

The Commission recommends that

**2.4.46**

Unsold surrendered lands be dealt with as follows:

(a) the Department of Indian Affairs and Northern Development compile an

inventory of all remaining unsold surrendered lands in the departmental land registry;

(b) unsold surrendered lands be returned to the community that originally surrendered them;

(c) First Nations have the option of accepting alternative lands or financial compensation instead of the lands originally surrendered but not be compelled to accept either; and

(d) governments negotiate protection of third-party interests affected by the return of unsold surrendered lands, such as continued use of waterways and rights of access to private lands.

***Return of expropriated lands***

Portions of reserves have been surrendered for a variety of private or public purposes, including fur trade posts, Christian missions, police stations and utility operations. Reserves have also, like private lands, been subject to expropriation. During the railway boom of the past century, many reserves were bisected by railway rights-of-way, and the lands for these were expropriated by the Crown (despite protests from First Nations). Another example — one that attracted significant notice in 1995 — involved the expropriation in 1942, under the *War Measures Act*, of the Stoney Point reserve on Lake Huron for a military base and weapons range.[397]

In other instances, it was not reserve lands themselves, but lands that Aboriginal peoples occupied and used for traditional harvesting that were expropriated. Thus, in the early 1950s, an area of 11,630 square kilometres, straddling the Alberta-Saskatchewan border, was set apart by federal/provincial agreement as the Primrose Lake Air Weapons Range. First Nations and Métis people were forbidden to carry on traditional activities (such as hunting, fishing and trapping) within the range. Although some First Nations people did receive payment for loss of traplines, the Indian Claims Commission (ICC) recently concluded that payments were completely inadequate to compensate for the loss of livelihood. The ICC found that the most productive harvesting lands of the Canoe Lake and Cold Lake First Nation communities had been taken up by the Primrose Lake range, with devastating consequences for their traditional economy.[398]

There are obvious policy implications when the original purpose for which lands were taken no longer exists. For example, CP and CN rail have stated their intention to abandon considerable amounts of track in eastern Canada — some of which runs through reserves.

In principle, the Commission believes that Aboriginal people should benefit from any disposal of rights to such land. In the case of the Stoney Point weapons range, which is no longer in use, the departments of national defence and Indian affairs did reach a tentative agreement with the nearby Kettle Point First Nation community, which had absorbed the former Stoney Point band following the original expropriation. That agreement was subsequently rejected, in part because of the perceived inadequacy of the financial settlement (as well as the fact that it did not provide for return of the land) and in part because descendants of the Stoney Point people argued that they alone should have been the beneficiaries of the agreement.

The difficulties surrounding the Stoney Point weapons range illustrate some of the problems with claims policy discussed earlier in this chapter. We believe that it is inappropriate for the owner — the federal Crown — unilaterally to establish the value of previously expropriated lands or the conditions of their return. At the very least, such matters should be resolved by negotiation. If the parties are unable to reach agreement, the Aboriginal Lands and Treaties Tribunal would be an ideal body to make such a determination.

There are other difficulties involved in the return of previously expropriated lands, such as clean-up and environmental monitoring and the associated costs. These should not be borne by the Aboriginal community affected. They can, however, represent an opportunity. In the case of a former weapons dump on the Sarcee reserve in Alberta, for example, Tsuut'ina Nation members have been trained in ordnance clean-up by retired defence department personnel, and they have been able to market this expertise elsewhere through a company, Wolf Floats, established for the purpose.

**Recommendation**

The Commission recommends that

**2.4.47**

If reserve or community lands were expropriated by or surrendered to the Crown for a public purpose and the original purpose no longer exists, the lands

be dealt with as follows:

(a) the land revert to the First Nations communities in question;

(b) if the expropriation was for the benefit of a third party (for example, a railway), the First Nations communities have the right of first refusal on such lands;

(c) any costs of acquisition of these lands be negotiated between the Crown and the First Nation, depending on the compensation given the First Nation community when the land was first acquired;

(d) if the land was held by the Crown, the costs associated with clean-up and environmental monitoring be borne by the government department or agency that controlled the lands;

(e) if the land was held by a third party, the costs associated with clean-up and environmental monitoring be borne jointly by the Crown and the third party;

(f) if an Aboriginal community does not wish the return of expropriated lands because of environmental damage or other reasons, they receive other lands in compensation or financial compensation equivalent to fair market value; and

(g) the content of such compensation package be determined by negotiation or, failing that, by the Aboriginal Lands and Treaties Tribunal.

## 7.2 Interim Steps: Improving Access to Natural Resources

The ability of First Nations people to derive a living from natural resources on their reserves has been hampered by federal policies. Provincial and territorial laws and policies have made it difficult for First Nations and Métis (and, in some regions, Inuit) to secure allocations of natural resources outside their reserves or community lands. In numerous instances — such as the Ojibwa commercial sturgeon fishery on Lake of the Woods — resources once used by Aboriginal communities were in effect confiscated by government and awarded to non-Aboriginal people.

Increasing the Aboriginal share of natural resources will therefore require direct

action by governments at all levels. Spelling out Aboriginal resource rights in the context of treaties will obviously provide the best long-term solution. But until that process is completed, governments should take interim steps to redress the balance. Some jurisdictions (such as British Columbia and Saskatchewan) are already improving First Nations' access to natural resources, and their approach could provide a model for other regions of the country.

Commissioners believe that it is in the federal government's interest to assist in the economic and cultural development of First Nations through opportunities in the natural resources sector. As a general principle, therefore, we encourage governments to rethink their overall allocation policies and licensing systems. As noted earlier, natural resource regulation regimes have historically favoured the maximization of production, which is a major reason that Aboriginal peoples were excluded from so many resource sectors. Even today, licensing systems continue to be based on economies of scale, on the assumption that the largest producers (whether in forestry, fisheries or other resource sectors) are the most efficient. But a new understanding of the concept of resource depletion, coupled with broad acceptance of the principles of sustainable development, means that old assumptions about efficiency may no longer be valid. The collapse of the Atlantic fishery is an excellent case in point. Changing the system of resource allocation to benefit Aboriginal harvesters (as well as other small producers in all regions of Canada) is not only a just solution, but also one that can make long-term environmental and economic sense.

We also believe that, as part of the law of fiduciary duty, Canada has an obligation to protect the exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands. There is a strong link, for example, between resource activities such as industrial forestry and negative effects on traditional activities. While some First Nations have treaties that guarantee certain harvesting rights, many do not — and all First Nations have had difficulty securing recognition of their broader Aboriginal rights. As for Métis people, and Inuit in Labrador, there has been no recognition of their right to pursue traditional harvesting activities at all. Similar standards that apply across the country would remove such inequities as well as provide greater certainty for provincial and territorial governments until the new treaty processes have been implemented.

We therefore urge the federal government to seek the agreement of the provinces and territories in enacting a national code to permit traditional Aboriginal activities on Crown lands, which the provinces and territories would

enact as part of their land and resource management law. Such a code and its contents could be an agenda item for an early meeting of federal and provincial ministers responsible for natural resources and public lands, following publication of this report.

Next, we examine other measures to increase Aboriginal access to and control over resources and help them gain a proper share in resource revenues. Future treaty negotiations will likely supplant or incorporate many of our recommendations. In some instances, however, we offer general observations to serve as a guide for negotiations.

**Recommendation**

The Commission recommends that

**2.4.48**

With respect to the general issue of improving Aboriginal access to natural resources on Crown land:

(a) the federal government seek the co-operation of provincial and territorial governments in drafting a national code of principles to recognize and affirm the continued exercise of traditional Aboriginal activities (hunting, fishing, trapping and gathering of medicinal and other plants) on Crown lands; and

(b) the provinces and territories amend relevant legislation to incorporate such a code.

***Forest resources***

In the mid-north, as well as in pockets of southern Canada, participation in the forest industry shows great potential for increasing Aboriginal self-sufficiency. Most reserves outside the prairie belt and the far north have at least some forest cover, and in the mid-north, reserves and settlements are surrounded by forested Crown land. But improving the Aboriginal share of forest resources will require better care of forests on reserves as well as changes in tenure systems for Crown forests.

Reserve forests

For much of the past century, the fate of renewable resources on reserve lands has been a dismal one. Most reserves in eastern Canada were stripped of their timber for the sake of short-term employment or a modest increase in band funds. Farsighted leaders such as Chief Dokis, of the French River area in Ontario, were subjected to continuous pressure from timber interests and government officials if they tried to slow down exploitation and conserve valuable resources on reserves.

Until quite recently, little forest management expertise was available to First Nations through the department of Indian affairs. There were few attempts at artificial regeneration and, on most reserves, natural regeneration has been only partially successful. Forested lands on reserves continue to require major restoration efforts. According to a 1994 federal report on reserve forests in Nova Scotia, woodlots are in poor condition in places where the stands are reasonably accessible.[399]

Only in the past decade has there been any real change. A number of First Nations have participated in the Indian forest lands program, a component of federal/provincial forest resource development agreements (FRDA). Unfortunately, there have been no similar programs for Métis people. The program has provided for some forest inventories, management plans and reforestation of reserve forests, as well as limited training and practical work opportunities for First Nations workers in the forest industry. In Nova Scotia, about $200,000 was being provided annually to the Confederacy of Mainland Micmacs to encourage forest management on reserves owned by 12 Nova Scotia First Nations.[400] Under the Indian forestry development program in northwestern Ontario, for example, 1050 hectares of reserve land had been planted and tended by 1990, 10 management plans prepared and almost 50 person-years of employment created for community members. The program was directed by representatives of three tribal councils in the area served by the Grand Council, Treaty 3.[401]

Although there has been general satisfaction with the Indian forest lands program, some Aboriginal groups, notably the National Aboriginal Forestry Association in its submission to the Commission, have criticized the program's focus on timber production. It should be modified, they state, to reflect and integrate the traditional ecological knowledge and resource values of Aboriginal communities.[402]

In his November 1992 report to Parliament, Auditor General Denis Desautels noted that overall federal support, even with FRDA, has been inadequate to

meet the reforestation requirements of Indian reserves or generally accepted standards of forest management. He also pointed out that the regulations governing forestry activities on Indian lands had not been changed in 50 years.[403] Yet the need for proper forest management on reserves has never been greater. As provinces respond to public criticism of forest management practices by tightening up their legislation (as in Ontario's new *Crown Forest Sustainability Act*[404]), the overall supply of wood fibre from Crown lands is diminishing. Particularly in British Columbia and Ontario (where the laws are toughest), mills have been actively seeking alternative sources of wood from adjacent provinces and private lands. In Ontario alone, the price paid for wood from private land has quadrupled since the new act was passed and could go much higher.

To the forest industry, reserves are, in effect, private lands; they have therefore been subject to the same kinds of development pressure. In Alberta, in a well-publicized incident in the spring of 1995, the Nakoda (Stoney) First Nation at Morley sold much of its reserve timber to a mill in neighbouring British Columbia.[405] Their chief was unapologetic. His people, he said, felt they had no alternative; the price was right, and the reserve had no other resources of value.

In early 1993, the federal government announced that as a cost-saving measure, it would no longer participate in federal/provincial forest resource development agreements. As those agreements expire — as the Canada-Nova Scotia agreement did on 31 March 1995 — they are not being renewed, which means that the Indian forest lands programs are disappearing along with them. Commissioners remind the department of Indian affairs and the department of natural resources that Canada has a fiduciary obligation to see that Indian lands are managed for the benefit of First Nations. That obligation includes stewardship of reserve forests.

**Recommendation**

The Commission recommends that

**2.4.49**

With respect to forest resources on reserves, the federal government take the following steps:

(a) immediately provide adequate funding to complete forest inventories, management plans and reforestation of Indian lands;

(b) ensure that adequate forest management expertise is available to First Nations;

(c) consult with Aboriginal governments to develop a joint policy statement delineating their respective responsibilities in relation to Indian reserve forests;

(d) develop an operating plan to implement its own responsibilities as defined through the joint policy development process;

(e) continue the Indian forest lands program, but modify its objectives to reflect and integrate traditional knowledge and the resource values of First Nations communities with objectives of timber production; and

(f) in keeping with the goal of Aboriginal nation building, provide for the delivery of the Indian forest lands program by First Nations organizations (as has been the case with the Treaty 3 region of northwestern Ontario).

***Crown forests***

Figures from the Canadian Council of Forest Ministers show that 80 per cent of all inventoried productive forests are on provincial Crown land, and 85 per cent of all forest harvesting occurs on provincial Crown land.[406] Hence, any plan to increase Aboriginal access to forest resources will have to address the current system of provincial ownership and management.

In Canada, 42 major tenure systems are used to grant property rights to forestry companies, ranging from comprehensive freehold to non-exclusive common property rights.[407] The three broad categories of tenure are forest management agreements, forest licences, and timber permits.

Forest management agreements called tree farm licences usually carry a 20-year term rolled over every five years and are area-based rather than volume-based. These agreements are the most significant form of tenure and are designed for companies that operate pulp and paper mills and/or major sawmills. Under these agreements, a wood processing facility is required because a major capital investment ensures that the company has both a vested interest in the licence area and enough capital to pay the costs of

fulfilling the required forest management responsibilities; and the facility generates employment. In most cases, the company has exclusive harvesting rights within the area. Companies are required to submit annual harvesting plans and five-year management plans to the provincial forest ministry.

Until recently, these agreements focused almost exclusively on timber production, with the associated requirements that a company manage the forest for harvesting, silviculture, planting, road building and tending to the free-to-grow stage. In many jurisdictions now (such as Ontario and British Columbia) the scope of management is being broadened by requiring companies to manage the forest for other uses such as recreation and grazing. Nevertheless, timber production remains the primary economic focus. Most agreements stipulate that the company must consult with the public and other stakeholders. In some cases the provinces allocate third-party harvesting rights, while in others the company grants these rights.

Forest licences can be issued for periods of between ten and 20 years and are renewable for up to 20 years. Awarded through a competitive bidding process, licences tend to be restricted to operators of sawmills or manufacturing facilities where the company makes a smaller investment and has fewer property rights, while the province retains most of the forest management responsibilities.

Timber permits (called district cutting licences in some areas) are usually from one to five years in length, granting only site-specific property rights, while the province retains all management responsibility. The permits are designed to fulfil domestic and other small timber needs such as fuel wood, poles and building materials.

Historically, Aboriginal people have not participated in forest management agreements or forest licences. They have been confined to the much more limited category of timber permits or district cutting licences and even then have suffered discrimination compared to other resource users. In its 1994 decision on provincial timber management planning, the Ontario environmental assessment board noted that Aboriginal people frequently complained that the district cutting licences they were receiving from the ministry of natural resources were for areas where the best timber had already been removed. They also objected that allocations were far too small to support employment or income within their communities. In northwestern Ontario, for example, 30 loggers on the Eagle Lake reserve were required to share 5,500 cords of wood, while a single non-Aboriginal contractor in nearby Dryden was given a quota of 15,000 cords.[408]

The ninth priority of the 1992 national forestry strategy for Canada focuses on Aboriginal peoples in a framework for action designed “to increase the involvement of Aboriginal people in forest land management ... to ensure the recognition of Aboriginal and treaty rights in forest management ... and to increase forest-based economic opportunities for Aboriginal people”.[409] Commissioners support these goals, but to reach them, a number of major barriers must be overcome. Fortunately, a great deal of progress is already being made in some regions.

One of the major impediments is that almost all of the most economically accessible forested lands are under long-term renewable licence or similar forms of tenure to large forest companies. The fact that such licences are renewable makes it difficult for provinces to provide timber allocations to Aboriginal firms. Related to this issue is the fact that forest management agreements in most provinces are tied to wood processing facilities. This acts as a barrier to Aboriginal people’s attempts to enter the forest industry. Recently, however, provinces such as British Columbia are showing flexibility by altering some of the conditions of their tree farm licences (for example, the requirement for a wood-processing facility). We encourage other provinces to follow this example.

Partnerships or joint ventures between Aboriginal forest operating companies and other firms that already own wood processing facilities — or have the finances to create one — are another promising model. In northern Quebec, Domtar and the Cree of Waswanipi plan to build a sawmill on that First Nation’s reserve, with the province agreeing to furnish an allocation of wood to the Cree-owned forest operating company, Nabakatuk.[410] In Saskatchewan, the Meadow Lake Tribal Council is generating employment and income from a once-failing sawmill purchased in a joint venture, which included an existing forest management agreement.

There are additional steps provinces could take to improve Aboriginal access to forest resources. The National Aboriginal Forestry Association has recommended that provinces amend their legislation to establish a special forest tenure category for holistic resource management by Aboriginal communities in their traditional territories or land use areas. This recommendation, which we support, would do a great deal to rectify the historical inequity in timber allocations to Aboriginal people. British Columbia, for example, already makes specific legislative provision for access to smaller amounts of Crown timber by First Nations. The B.C. *Forest Act* provides for

woodlot licences of up to 400 hectares of Crown land for terms of up to 15 years. Several First Nations and communities have already taken advantage of this provision, combining the forested portion of their reserves with the leased Crown land.[411]

**Tanizul Timber Limited**

In 1981, the Tl'azt'en Nation (formerly known as the Stuart-Trembleur Band) in the Fort St. James area of central British Columbia bid for and received a tree farm licence (tfl) from the British Columbia Ministry of Forests. The licence itself is held by six members of the nation in trust for the entire community.

To obtain its licence, the Tl'azt'en combined some 2,500 acres of its reserve lands with 49,000 hectares of provincial Crown lands. To complete that commitment, special federal regulations under the Indian Act were prepared to allow for management of the Indian reserve portion of the tree farm licence under the terms of the b.c. Forest Act and regulations. A second unusual characteristic of this tfl was that it excluded the operation of a wood-processing facility, because b.c. officials believed that there was already enough milling capacity in the region. As a consequence, Tanizul Timber has been selling its logs on the open market. However, Tanizul Timber is now completing a sawmill so that it can profit from value-added manufacturing.

The two principal logging contractors employed by Tanizul are owned by community members, and more than half the 80 jobs in logging, road construction and reforestation are filled by band members or other Aboriginal people.

Source: National Aboriginal Forestry Association, "Forest Lands and Resources for Aboriginal People: An Intervention Submitted to RCAP" (August 1993).

The diminishing quantity of unallocated forest land in most jurisdictions makes it more difficult to be innovative. In Ontario, for example, much of the Crown land is already tied up under long-term licence. In Nova Scotia, there is little Crown forest at all — about 72 per cent of forested lands are under private tenure, compared with the Canadian average of 10 per cent.[412] Nevertheless, there are still things that can be done. One is priority of allocation. Where unalienated Crown timber exists close to reserves or Aboriginal communities,

provinces could award those timber licences to Aboriginal people. The Ontario environmental assessment board, as part of its April 1994 decision on Crown timber management, has ordered the ministry of natural resources to implement just such a practice.[413]

However, it will not be enough simply to incorporate Aboriginal people into existing systems of forest tenure and management. It is important to give proper consideration to Aboriginal values. In both the Tanizul Timber and NorSask ventures, local Aboriginal people, while appreciating the employment opportunities, have expressed concerns about the overall impact of forest operations. Tanizul Timber is obliged to operate according to British Columbia ministry of forest regulations that enshrine established industrial forestry practices — including clearcutting and extensive road construction. Some members of the community object that these practices emphasize timber production at the expense of their traditional activities and the holistic management philosophies of community elders. Moreover, logging roads have also made the area more accessible, increasing hunting competition from recreational hunters from outside the community.[414]

**NorSask Forest Products Limited**

In 1988, the Meadow Lake Tribal Council, acting on behalf of nine First Nation communities in northern Saskatchewan, took advantage of the receivership of a local sawmill to join forces with the mill's employees and purchase the mill. They also assumed the former company's forest management licence agreement. The new company, NorSask Forest Products, which uses only softwoods in its sawmill, has joined forces with a pulp manufacturing firm interested in establishing a mill that would use hardwoods. In 1990, NorSask Forest Products and Millar Western Pulpmill Limited became partners. A new firm, Mistic Management Ltd., owned jointly by NorSask and Millar Western, with the Meadow Lake Chiefs District Investment Company and employees of the local sawmill as majority shareholders, was set up to operate the timber limits.

At present, Mistic Management relies on a non-Aboriginal forestry and technical staff, but already some 20 per cent of the logging is by the Meadow Lake Tribal Council Logging Company, and this proportion is expected to increase.

Source: National Aboriginal Forestry Association, "Forest Lands and Resources for

Aboriginal People: An Intervention Submitted to RCAP" (August 1993), p. 21.

In Saskatchewan, there have been similar conflicts between the logging practices of Mistic Management — which are based on provincial management regulations and policies — and Métis and First Nations people concerned about maintaining traditional employment in hunting, trapping and fishing. Max Morin of the Metis Society of Saskatchewan raised this issue in his appearance before us. As a result of the protests, four forestry advisory boards have been set up with representation from the company, local First Nations communities and the provincial forestry administration to deal with problems between timber harvesting plans and trapping and hunting interests. The boards may place restrictions on forest management plans, although the province retains final decision-making power.[415]

Commissioners encourage the provinces to show greater flexibility in their timber management policies and guidelines. Some jurisdictions are already reducing their annual allowable cut requirements and the size of clearcut areas. Continued experimentation with lower harvesting rates, smaller logging areas, and longer maintenance of areas left unlogged would allow greater harmonization with generally less intensive Aboriginal forest management practices and traditional Aboriginal activities.

In May 1995, a scientific panel appointed by the British Columbia government — which included Aboriginal representatives — released its final report on forestry practices in the Clayoquot Sound area of Vancouver Island. This and the panel's other reports are particularly critical of clearcutting, the dominant harvesting method in British Columbia and elsewhere in Canada. As currently practised, clearcutting "removes all trees in a given area in one cutting, after which an even-aged stand is established by planting or natural regeneration ... .most of the opening is not shaded or sheltered by the surrounding forest". This lack of shelter has major consequences for the viability and diversity of forest life. The panel's reports stress the need to maintain forest integrity, recommending that at least 15 per cent of trees be retained in all cutting areas and 70 per cent be kept where there are "significant values for resources other than timber". The panel also recommends that forest structures and habitat elements such as large old trees, snags and downed wood — which are important for regeneration and as insect and wildlife habitat — be retained.[416]

The panel concluded that existing provincial planning procedures were inadequate for sustainable ecosystem management. Forest companies and the provincial forests ministry, it said, had failed to take adequate account of the

physical and ecological connections among land-based, freshwater and marine ecosystems and had failed to incorporate First Nations' values and perspectives:

Human activities must respect the land, the sea and all the life and life systems they support ... .Long-term ecological and economic sustainability are essential to long-term harmony ... .The cultural, spiritual, social and economic well-being of indigenous people is a necessary part of that harmony.[417]

We believe that the conclusions of the Clayoquot Sound panel — particularly those concerning Aboriginal peoples — are valid for all forested regions of Canada and should be incorporated in planning processes. We urge the provinces to allow Aboriginal people to review forest management and operating plans within their traditional land-use areas. This would be parallel to — but separate from — other public consultation processes regarding such plans. This is already happening in Ontario where, in 1990, the province agreed to give the Teme-Augama Anishinabai an advisory role in timber management planning within the ministry's Temagami District (see Appendix 4B). More recently, under the terms of its April 1994 decision, the Ontario environmental assessment board ordered the ministry of natural resources to implement a special Aboriginal consultation process in all timber management planning throughout the province.[418]

Consultation is only part of the answer, however, because it leaves Aboriginal people in the position of responding to plans that have already been drafted. Far better to involve Aboriginal people in planning from the beginning. In Quebec, the Barriere Lake Trilateral Agreement, which was renewed in 1995 for another year, enables the local Algonquin community to participate in preparing a draft integrated management plan for renewable resources within the 10,000 square kilometre area of their traditional lands (see Appendix 4B). In keeping with the concept of sustainable development, environmental assessments are already part of the forest management planning process. In some jurisdictions, such as Ontario, proposed new timber management planning guidelines may also require heritage assessments. Given the importance of Aboriginal land use in so many areas of the country, such guidelines should address Aboriginal issues and concerns specifically. The Commission urges the provinces, therefore, to make Aboriginal land-use studies — developed in collaboration with Aboriginal peoples — a requirement of all forest management plans.

Finally, we turn to the question of federal involvement. We are encouraged by

the fact that the federal department of natural resources has been actively promoting First Nations involvement in resource planning and research outside their reserve lands. In Saskatchewan, the Prince Albert model forest, partly funded by the federal forest service, recognizes Aboriginal people as an integral component of the forest ecosystem. The Prince Albert Tribal Council, the Montreal Lake Indian band, the Lac La Ronge Indian band, and the Federation of Saskatchewan Indian Nations are full partners in the program, along with Weyerhauser Canada Ltd., Prince Albert National Park of the Canadian parks service, and the Saskatchewan department of environment and resource management. Three of the seven directors on the board of the model forest partnership are First Nations representatives.[419] Similarly, the Abitibi model forest project in northeastern Ontario — also funded in part by the federal forest service — has the Wagoshig First Nation as a full partner along with Abitibi-Price Ltd. and the Ontario ministry of natural resources. Significantly, a part of that project is the identification of Aboriginal sacred sites and other heritage sites and the documentation of past and present Aboriginal land use.

In keeping with its fiduciary obligation to protect traditional Aboriginal activities on provincial Crown lands, the federal government should actively promote Aboriginal involvement in provincial forest management and planning. As with the model forest program, this would include bearing part of the costs.

**Recommendation**

The Commission recommends that

**2.4.50**

The following steps be taken with respect to Aboriginal access to forest resources on Crown lands:

(a) the federal government work with the provinces, the territories and Aboriginal communities to improve Aboriginal access to forest resources on Crown lands;

(b) the federal government, as part of its obligation to protect traditional Aboriginal activities on provincial Crown lands, actively promote Aboriginal involvement in provincial forest management and planning; as with the model forest program, this would include bearing part of the costs;

(c) the federal government, in keeping with the goal of Aboriginal nation building, give continuing financial and logistical support to Aboriginal peoples' regional and national forest resources associations;

(d) the provinces encourage their large timber licensees to provide for forest management partnerships with Aboriginal firms within the traditional territories of Aboriginal communities;

(e) the provinces encourage partnerships or joint ventures between Aboriginal forest operating companies and other firms that already have wood processing facilities;

(f) the provinces give Aboriginal people the right of first refusal on unallocated Crown timber close to reserves or Aboriginal communities;

(g) the provinces, to promote greater harmony with generally less intensive Aboriginal forest management practices and traditional land-use activities, show greater flexibility in their timber management policies and guidelines; this might include reducing annual allowable cut requirements and experimenting with lower harvesting rates, smaller logging areas and longer maintenance of areas left unlogged;

(h) provincial and territorial governments make provision for a special role for Aboriginal governments in reviewing forest management and operating plans within their traditional territories; and

(i) provincial and territorial governments make Aboriginal land-use studies a requirement of all forest management plans.

### *Mining, oil and natural gas*

Resource development, including mining activity and oil and gas exploration, has often been problematic for Aboriginal people. With the exception of oil and natural gas in Alberta, First Nations have not generally benefited from the presence of minerals on reserve lands. Aboriginal peoples generally have not been consulted about development activities; usually they have not been guaranteed, nor have they obtained, specific economic benefits from such activities on their traditional lands; and they have had difficulty protecting their traditional use areas from the effects of development. This has been the case, for example, with Dene Th'a in northwestern Alberta.

### *Mineral, oil and natural gas resources on reserves*

Where First Nations were able to retain ownership of some subsurface deposits on their reserves, as in the case of oil and gas resources in Alberta, the department of Indian affairs maintained control over all aspects of commercial development. This practice continues today. Consequently, many First Nations have not developed management experience or benefited from employment or the transfer of industry knowledge and expertise.[420] Departmental regulations are also inconsistent in the requirements they impose on industry. For example, while the Indian oil and gas regulations require companies operating on reserves to employ First Nations residents, the Indian mining regulations do not.[421]

Most First Nations have derived minimal benefit from mineral resources on their reserves. Federal/provincial agreements may have satisfied the provinces, which gained half the potential revenue from future mineral development, but, in the words of a recent text on Canadian mining law, those agreements appear to have been concluded “more for administrative expedience than for legal clarification”. The resulting combination of complexity, contested legal entitlement and inadequate returns for First Nations has had a “dampening effect on mineral exploration on reserves”.[422] Renegotiation of those agreements should be an urgent priority for the federal government.

### Recommendations

The Commission recommends that

**2.4.51**

In keeping with its fiduciary obligation to Aboriginal peoples, the federal government renegotiate existing agreements with the provinces (for example, the 1924 agreement with Ontario and the 1930 natural resource transfer agreements in the prairie provinces) to ensure that First Nations obtain the full beneficial interest in minerals, oil and natural gas located on reserves.

**2.4.52**

The federal government amend the Indian mining regulations to conform to the Indian oil and gas regulations and require companies operating on reserves to

employ First Nations residents.

**2.4.53**

The federal government work with First Nations and the mining industry (and if necessary amend the Indian mining regulations and the Indian oil and gas regulations) to ensure the development of management experience among Aboriginal people and the transfer to them of industry knowledge and expertise.

Mineral resources on Crown lands

Before turning to our specific policy recommendations, we make some general observations about the process of mineral development. A mine involves three phases: exploration and development, mining and reclamation. The industry includes companies involved in mineral exploration, mining or extraction of ore, milling or concentrating, smelting and refining, processing of industrial minerals and environmental reclamation services (a newcomer to the industry) that return the land to an environmentally acceptable state. Smaller firms tend to concentrate on exploration, while larger companies are involved in all phases. The current trend is for larger companies to contract out field work, such as exploration and related services, because many companies have no field workers, tradespeople, or technicians on permanent staff. Exploration continues, as the deposit is mined, in order to extend the life of the mine.[423]

*Consultation*

In the Northwest Territories and Yukon it has become standard practice for the territorial government to advise Aboriginal communities of the zones within their traditional land use areas for which mineral or oil and gas exploration permits have been let, along with the name of the company and a contact person. In British Columbia, a 1995 Crown land activities and Aboriginal rights policy framework requires provincial officials to give similar notice to First Nations communities.[424] Commissioners urge all provinces to adopt the same practice.

The provinces should also require exploration companies to contact Aboriginal communities in the area. (The provincial department responsible should provide the names of communities and contact persons.) The Commission urges provinces and companies to develop consultation mechanisms that encourage Aboriginal communities to participate in initial exploration, development and mining plans and provide non-technical information to the

communities, so that they can fully appreciate the implications and play a real role in the planning process.

*Socio-economic benefits*

Aboriginal involvement in the mining industry would include socio-economic agreements with Aboriginal communities affected by development. As with the forest industry, Commissioners believe that Canada and the provinces should encourage partnerships or joint ventures between Aboriginal companies and firms involved in mining or oil and gas exploration and development. Provinces could give preference in awarding licences to natural resource companies that pursue joint ventures, make special training and employment commitments or commit to major contract work with an Aboriginal community or business.

*Protection of traditional activities*

Commissioners believe that the federal government has an obligation to protect existing Aboriginal activities on Crown land. In the Northwest Territories and the Yukon, where the Crown in right of Canada retains ultimate title and jurisdiction over lands and resources, recent comprehensive claims settlements provide for a wide range of Aboriginal benefits from resource development outside their community lands, as well as guaranteed roles for Aboriginal governments in planning and managing Crown land activities (see Appendices 4A and 4B).

Once new treaties are made (as in British Columbia) or old ones renewed, the same kinds of measures will apply within the provinces. However, even where such agreements have not yet been made, the federal government still has an obligation to maximize net benefits to Aboriginal people in areas adjacent to new mineral and petroleum ventures.

**Recommendations**

The Commission recommends that

**2.4.54**

The provinces require companies, as part of their operating licence, to develop Aboriginal land use plans to

(a) protect traditional harvesting and other areas (for example, sacred sites);

and

(b) compensate those adversely affected by mining or drilling (for example, Aboriginal hunters, trappers and fishers).

**2.4.55**

Land use plans be developed in consultation with affected Aboriginal communities as follows:

(a) Aboriginal communities receive intervener funding to carry out the consultation process;

(b) intervener funding be delivered through a body at arm's length from the company and the respective provincial ministry responsible for the respective natural resource; and

(c) funding for this body come from licence fees and from provincial or federal government departments responsible for the environment.

**2.4.56**

The provinces require that a compensation fund be set up and that contributions to it be part of licence fees. Alternatively, governments could consider this an allowable operating expense for corporate tax purposes.

**2.4.57**

The federal government work with the provinces and with Aboriginal communities to ensure that the steps we recommend are carried out. Federal participation could include cost-sharing arrangements with the provinces.

***Cultural heritage***

Recognition of Aboriginal ownership of sacred and secular heritage sites on Crown land would give Aboriginal people a powerful tool to monitor activities carried out on their traditional land-use areas. Such recognition would also enable Aboriginal people, should they so wish, to derive important economic benefits from tourism and related activities. Lack of certainty about the status of Aboriginal cultural sites continues to create problems for Aboriginal peoples, for

state management agencies, and for third parties. For example, the occupation of Ontario's Ipperwash Provincial Park on Labour Day, 1995, was premised in part on assertions that the park contains sites sacred to local Ojibwa.

In the case of Aboriginal heritage sites already located on-reserve, it is clearly easier to institute protection policies. Dreamers' Rock, for example, is a votive site on the north shore of Lake Huron that is sacred to the nearby Whitefish River First Nation community and other Ojibwa. Although a provincial highway that is a popular tourist route runs through the reserve, provincial heritage policy requires tourists to obtain permission from the Whitefish River band office before visiting the site. As yet, however, the Whitefish River people do not follow the example of tribes in the American southwest, which charge fees for site visits and photography permits.

Internationally, Aboriginal title and jurisdiction over sacred and secular sites have been dealt with in various ways. In the United States, sacred sites on federal lands are protected through the *American Indian Religious Freedom Act* of 1978, which guarantees the right to "believe, express and exercise the traditional religions of the American Indian, Eskimo, Aleut and Native Hawaiian". The statute instructs federal agencies to inventory all sacred places on federal lands and draw up management policies to preserve the traditional religious practices and values associated with them.[425] However, the law does not have an enforcement mechanism, and in most instances of conflict between sacred sites and development activities, tribes have been unsuccessful in attempts to invoke the statute. The Hopi and Navajo people, for example, were unsuccessful in blocking development of a ski resort at San Francisco Peaks, Arizona.[426]

In Australia, Aboriginal people are the legal owners of the Kakadu and Uluru-Kata Tjuta national parks in the Northern Territory. The latter park includes the internationally renowned Aboriginal sacred site, Ayers Rock. The parks are leased back to the Australian federal government and managed jointly by Aboriginal people and the Australian national parks and wildlife service. What made recognition of Aboriginal ownership possible was the Commonwealth government's decision in 1978 to amend the law to allow the Crown to lease parklands, rather than continue to own them outright.[427]

There have also been recent examples of Aboriginal involvement in heritage sites on Crown land. One of the most prominent is Head-Smashed-In Buffalo Jump in the Porcupine Hills of southwestern Alberta, where the government of Alberta constructed and operates an interpretive centre with the active

participation of members of the nearby Blood and Peigan nations, part of the Blackfoot Confederacy. Now a UNESCO World Heritage Site, it was used by Aboriginal people for thousands of years. Although there were a number of controversies during development of the project in the early 1980s (involving such important matters as the proper display of medicine bundles and other sacred artifacts), the result has been a significant degree of Aboriginal involvement. Since the opening of the interpretive centre, all guides and supervisors have been Blackfoot people. Moreover, the centre has become a focus of Aboriginal culture, with Blackfoot weddings, funerals and other ceremonies being held there along with an annual pow-wow. Despite these good relations, the Peigan and Blood nations continue to have concerns about the fact that the province, not the Blackfoot Confederacy, retains ownership of the site.[428]

The Yukon Umbrella Final Agreement includes a number of specific measures to protect Aboriginal sacred and secular sites on Crown land. So do most of the recent comprehensive claims settlements. The Yukon agreement calls for the creation of a Yukon heritage resources board, with equal representation from the Council for Yukon Indians and government appointees, to advise on the management of movable heritage resources and heritage sites throughout the Yukon. Furthermore, each Yukon First Nation will own heritage resources on its settlement lands and within its traditional land-use area.[429]

These modern treaties in the North also provide for setting apart new national and territorial parks, to which Aboriginal people will have guaranteed rights of access, along with economic benefits and a role in management. Aboriginal people will not be the recognized owners of these new parks. The only instance to date in which Canada has agreed to discuss issues of park ownership is in British Columbia, where the federal government and the Haida are sharing jurisdiction over the Gwaii Haanas/South Moresby National Park reserve. The parties have, in effect, agreed to disagree about title in order to allow the park to be set aside as a protected area.

Claims settlements and recent heritage legislation in many jurisdictions, therefore, are making it somewhat easier for Aboriginal people to protect their sacred and secular sites on Crown land. Such protection is in keeping with guidelines issued by the international committee on monuments and sites, which place a priority on recognizing Aboriginal interests. Aboriginal heritage resources can be grouped into three broad categories, which have varying degrees of protection in current policies and legislation: